Supreme Court, U. S.
FILED
FEB 28 1980
MICHAEL RODAK, JR., CLERK

79-1336

No.

In the

Supreme Court of the United States

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

Louis T. Duerinck
James P. Daley
Stuart F. Gassner
400 West Madison Street
Chicago, Illinois 60606
Telephone: (312) 454-6506

Frank W. Davis, Jr.
Bruce E. Johnson
2600 Ruan Center
Des Moines, Iowa 50309
Telephone: (515) 243-6251
Attorneys for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	6, 7
CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED	7
STATEMENT OF THE CASE	2-6
REASONS FOR GRANTING THE WRIT	8-20
CONCLUSION	21

APPENDIX:

Order of the Supreme Court of Iowa	1a
Opinion of the Court of Appeals of Iowa	2a-12a
Findings of Fact, Conclusions of Law, and Judgment of the District Court of the State of Iowa in and for Webster County	12a-33a
April 30, 1976, Order of the Interstate Commerce Commission	33a-40a
September 23, 1976, Order of the Interstate Commerce Commission	40a-41a
Excerpt of Testimony of Plaintiff's Officer Jerry Schnurr	42a
Constitutional Provisions and Statutes	42a-52a
Answer of Chicago and Northwestern Transportation Company to Plaintiff's Petition	52a-56a
Answer of Chicago and Northwestern Transportation Company to Plaintiff's Amendment to Petition	57a-64a

PAGE

Motion for Summary Judgment Filed by Chicago and Northwestern Transportation Company 64a-67a

Motion to Dismiss Filed by Chicago and Northwestern Transportation Company 68a-76a

CITATIONS

Cases

Asbury v. Chesapeake & Ohio Railway Company, 314 F. Supp. 310 (1970) 10

Auracher v. Omaha & St. L. R. Co., 102 F. 1 (1900) .. 12

B & B Asphalt Co. v. T .S. McShane Co., 242 NW 2d 279 (1976) 15

Baird Brothers v. Minneapolis & St. Louis Railroad, 181 Iowa 1104 (1917) 11

Baltimore & Ohio Railroad Company, et al. v. New York, New Haven & Hartford Railroad Company, 1976 F. Supp. 724 (1961) 17

Board of Supervisors, Carroll County v. Chicago and Northwestern Transportation Company, 260 NW 2d 813 (1977) 17

Burlington Northern v. Department of Public Service, 240 NW2d 554 (1976) 10, 12, 14

Chicago v. Atchison, Topeka & Santa Fe R. Co., 357 US 77 (1958) 18

Chicago & North Western Ry. Co. v. Union Packing Co., 373 F. Supp. 734 (1974) 9

Chicago, M., St. P. & P. R. Co. v. Michigan Pub. Serv. Commission, 50 NW2d 884 (1952) 14, 15

Chicago, Rock Island & Pac. Ry. Co. v. Hardwick Farmers Elevator Co., 226 US 426 (1912) 11

Chicago, Rock Island and Pac. Ry. Co. v. Linwood Stone Products Co., 138 NW2d 902 (Iowa 1965) 11

PAGE

Davis v. Keystone Steel & Wire Co., 148 NE 47 (1925) 14

Eastern Railway Co. v. Littlefield, 237 US 140 (1915) 10

Elgin Coal Co. v. Louisville & Nashville R.R. Co., 411 F2d 1043 (6th Cir. 1969) 20

Far East Conference v. United States, 342 US 570 (1952) 20

General Foods Corp. v. Baker, 451 F. Supp. 873 (1978) 10, 17

Goolsby v. Derby, 189 NW2d 909 (1971) 15

Hampton v. St. Louis, Iron Mountain and Southern Ry. Co., 227 US 456 (1912) 11

Holt Motor Co. v. Nicholson Universal S. S. Co., 56 F. Supp. 585 (1944) 10

I.C.C. v. Baltimore & Annapolis RR. Co., 398 F. Supp. 454 (1975) 19

I.C.C. v. Oregon Pacific Industries, Inc., 420 US 184 (1975) 10

In Re Rules and Regulations Nos. 31 and 32, 225 NW2d 401 (1975) 14

Interstate Commerce Comm. v. Atlantic Coast Line Co., 383 US 576 (1966) 12, 18

Illinois Central R.R. Co. v. Mulberry Hill Coal Co., 238 US 275 (1915) 12, 20

Landreth v. Wabash R. Co., 153 F2d 98 (7th Cir. 1948) 17

Loomis v. Lehigh Valley R.R. Co., 240 US 43 (1916) ..19, 20

Louisville & N.R. Co. v. Brashear, 289 SW 1094 (1927) 14

PAGE

Midland Valley RR. Co. v. Barkley, et al., 276 US 482 (1927) 19, 20

Missouri-Kansas-Texas Railroad Company Abandonment Between Altos and Forgan, Oklahoma, 338 ICC 728 (1971) 17

Missouri Pacific RR. Co. v. Stroud, 267 US 404 (1925) 9, 11, 12, 13

Myers v. Arkansas & Ozarks Railway Corp., 185 F. Supp. 36 (1960) 9

Pennsylvania R.R. Co. v. Puritan Coal Mining Co., 237 US 121 (1915) 12, 20

Pennsylvania R.R. Co. v. Sonman Shaft Coal Co., 242 US 120, 61 L.Ed. 188, 37 S. Ct. 46 (1916) 12, 20

Peoria & P. U. R. Co. v. United States, 263 US 528 (1923) 10

Powell v. United States, 300 US 276 (1937) 9, 10

Seatrain Lines, Inc. v. Pennsylvania R. Co., et al., 207 F2d 255 (3rd Cir. 1953) 17

S.H. & W. Lumber Co. v. California & O.C. R.R., 154 F.Supp. 152 (1957) 10

Siba Corp. v. Weinberger, Secretary of Health, Education & Welfare, et al., 412 US 640 (1973) 17

Spence v. Baltimore & Ohio Railroad Company, 360 F2d 887 (7th Cir. 1966) 20

Texas & P. R.I. v. Gulf C. & S.F. Ry., 270 US 266 (1926) 10

United States v. New River Company, 265 US 533 (1923) 11, 13, 19

United States v. State of South Dakota, 212 F2d 14 (8th Cir. 1954) 17

United States v. Willard Tablet Co., 141 F2d 141 (7th Cir. 1944) 17

PAGE

CONSTITUTIONAL PROVISIONS AND STATUTES

Interstate Commerce Act,
49 U.S.C. §1 ..... 7, 11
49 U.S.C. §1(10) 7, 14
49 U.S.C. §1(11) 7, 11, 13, 14
49 U.S.C. §1(13) 7
49 U.S.C. §1(17)(a) 7, 14, 20
49 U.S.C. §1(18) 7, 10
49 U.S.C. §1(20) 7, 10
49 U.S.C. §3 13
49 U.S.C. §8 ..... 7, 11
49 U.S.C. §9 ..... 7, 11
49 U.S.C. §15 13
28 U.S.C. §2321(a) 17
28 U.S.C. §§2342(5) 17
49 U.S.C.A. §1(11), Historical Notes 13
Code of Iowa, 1973
§479.3 ..... 7, 8
§479.122 ..... 7, 8
Constitution of the United States, Article VI, Clause 2 ("Supremacy Clause") 7, 17

IN THE

SUPREME COURT OF THE UNITED STATES

No.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

Petitioner prays that a Writ of Certiorari issue to review the order of the Supreme Court of Iowa rendered in these proceedings on November 30, 1979, affirming the opinion of the Iowa Court of Appeals filed October 18, 1979.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the District Court of the State of Iowa in and for Webster County, filed July 29, 1977, are unreported and appear at Appendix pages 12a-33a.

The opinion of the Iowa Court of Appeals, filed October 18, 1979, is unreported and appears at Appendix pages 2a-12a.

The Order of the Supreme Court of Iowa, filed November 30, 1979, is unreported and appears at Appendix page 1a.

JURISDICTION

The Order of the Supreme Court was rendered on November 30, 1979, and is final. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 USC §1257(3).

STATEMENT OF THE CASE

In April of 1973, the Chicago and Northwestern Transportation Company ("Transportation Company") ceased operating trains over its branch line to Kalo Brick & Tile Company's ("Kalo") plant site. On November 14, 1973, the Transportation Company applied to the Interstate Commerce Commission, pursuant to the provisions of the Interstate Commerce Act, 49 USC §1(18), for a certificate of public convenience and necessity authorizing it to abandon its line to Kalo. On September 13, 1974, Kalo filed a petition in the Iowa District Court for Webster County seeking $350,000 in damages from the Transportation Company for alleged destruction of Kalo's business. The petition, as amended, claims damages based on three state law theories: (1) violation of §479.3, Iowa Code, 1973, requiring rail carriers to furnish suitable cars to shippers; (2) violation of §479.122, Iowa Code, 1973, rendering rail carriers liable for damages caused by their negligence; and (3) common law tortious interference with contractual relationships between Kalo and its customers.[1]

---

[1] The Transportation Company answered that Kalo's sole remedies were under 49 USC §1, et. seq., and that the state court did not have subject matter jurisdiction. (Appendix page 64a.)

On April 30, 1976, the Commission entered an order permitting abandonment that was affirmed by the Commission's order entered September 23, 1976.

Trial of Kalo's claims commenced October 19, 1976, and ended October 26, 1976.[2] The trial court's Findings of Fact, Conclusions of Law, and Judgment, filed July 29, 1977, dismissed all of Kalo's claims on the grounds that the trial court did not have subject matter jurisdiction, and that in any event the ICC had in prior proceedings decided issues adversely to Kalo that were determinative of all of Kalo's claims and Kalo was collaterally estopped from relitigating those issues. (Appendix pages 12a-33a.)

The Court of Appeals of Iowa reversed the trial court and remanded for a new trial, holding that the trial court had jurisdiction but not clearly addressing the res judicata/collateral estoppel issue.[3] (Appendix page 12a.)

---

[2] On November 2, 1976, the Transportation Company filed a Motion to Dismiss, stating that pursuant to stipulation of record the Motion would be treated as though it was first made at the close of Plaintiff's evidence and renewed at the close of all the evidence, and raising the defenses of collateral estoppel based on the prior Commission proceedings, lack of subject matter jurisdiction because of the preemption of state law by the Interstate Commerce Act, and lack of subject matter jurisdiction because the issues fell within the primary jurisdiction of the ICC. (Appendix pages 68a-76a.)

[3] In Divisions I, II, and III of its Brief to the Court of Appeals the Transportation Company argued that Kalo was collaterally estopped because of the prior Commission proceedings and that the state court lacked subject matter jurisdiction because of the preemption of state law and because the Commission had primary jurisdiction.

The Transportation Company filed with the Iowa Supreme Court an Application for Further Review of the Decision of the Court of Appeals.[4] The Iowa Supreme Court affirmed the decision of the Court of Appeals.

The facts of the case are as follows:

Prior to April, 1973, the Transportation Company operated trains over a five mile long branch line running from Fort Dodge, Iowa, to Kalo. Kalo was the only shipper on the line in 1973, and used the line exclusively for Interstate Commerce. (Trial Court Opinion page 2, Appendix page 13a; Testimony of Jerry Schnurr, Appendix page 33a.) In 1967 earth slides occurred and portions of the Transportation Company's branch line disappeared into the Des Moines River. In order to continue providing trains to Kalo the Transportation Company leased a portion of the Fort Dodge, Des Moines & Southern Railway line. (Trial Court Opinion Pages 2-4, Appendix pages 14a, 15a.)

During the first few days of April, 1973, earth slides occurred along many points of the line leading to Kalo. On April 4, 1973, the Transportation Company notified Kalo that it could no longer send trains to Kalo's plant site. The Transportation Company then provided cars to Kalo at its Fort Dodge, Iowa, station about five miles from Kalo's plant. (Trial Court Opinion 4-5, Appendix page 15a.)

---

[4] In §2(a), 2(b), and 3 of its Application for Further Review the Transportation Company raised the defenses of lack of subject matter jurisdiction because of the preemption of state law and because the Commission had primary jurisdiction, and also argued that Kalo was collaterally estopped by the prior Commission proceedings.

On April 18, 1973, Kalo notified its customers that it was going out of business but would fulfill its existing contracts. (Trial Court Opinion page 5, Appendix page 15a.)

Between April 4, 1973, and April 25, 1973, a decision was made by the Transportation Company that it could not maintain safe rail passage over the tracks leading to Kalo and that line was taken out of service by the Transportation Company's road master. The Transportation Company concluded that it could not stabilize the alignment of the tracks but it made no decision at that time as to whether it would attempt to abandon service to Kalo. (Trial Court Opinion page 5, Appendix pages 15a-17a.)

In August, 1973, Kalo stopped production, sold its inventory, and disposed of its assets. (Trial Court Opinion page 5, Appendix page 17a.)

On November 14, 1973, the Transportation Company applied to the Commission for permission to abandon its line to Kalo. Kalo filed objections to the abandonment and otherwise participated in the abandonment proceedings. After some delay,[5] on April 30, 1976, the I.C.C. entered an order making the following findings of fact:

---

[5] The delay resulted because this was the period in which the Commission was wrestling with the problem of how to proceed with abandonment applications in light of the decision in *Harlem Valley Transportation Association* v. *Stafford,* 500 F2d 328, 335-336 (2nd Cir. 1974), holding that an environmental impact statement must be drafted and other requirements of the National Environmental Policy Act, 42 USC §4321-4347, must be met before the Commission could permit abandonment of a railroad line.

> "that the cost of rehabilitation of the applicant's line is estimated to be in excess of $150,000; that the cost of rehabilitation of the leased track is estimated to be in excess of $100,000; that, due to the soil condition and mining activities in the area, the repairs would not be sufficient to insure continuous operations on the line . . . That THE CESSATION OF SERVICE OCCURRED BECAUSE OF CONDITIONS OVER WHICH APPLICANT HAD NO CONTROL, NOT BECAUSE OF WILLFUL ABONDONMENT . . . and that, under these circumstances, continued operation of the line would be an unnecessary burden on Applicant and on Interstate Commerce . . ." (Emphasis supplied)

The order provided for issuance of an appropriate certificate of abandonment. Upon Kalo's petition for reconsideration the April 30, 1976, order was affirmed by the I.C.C. in its order entered September 23, 1976. (I.C.C. Orders, Appendix pages 33a-41a.) No appeal was filed.

QUESTIONS PRESENTED

The Transportation Company operated over a five mile long branch line that became physically impassable on April 4, 1973. Kalo was the only shipper on the line. Kalo has sued the Transportation Company in State Court for $350,000 in damages for destruction of its business. All of Kalo's rail shipments over the line were in Interstate Commerce. The Interstate Commerce ("I.C.C.") had entered an order permitting the Transportation Company to abandon the line and finding that cessation of service was not an unlawful abandonment but was due to conditions beyond the Transportation Company's control, and that requiring reconstruction of the

line would be an undue burden of the Transportation Company and on interstate commerce.

This case presents the following questions for review:

1. Has the Interstate Commerce Act preempted the power of state courts over rail carriers in matters of railroad line abandonment and provision of car service in interstate commerce?

2. Do the Supremacy Clause of the Constitution and the doctrine of res judicata/collateral estoppel require a state court to give effect to prior decisions of the I.C.C., acting within its exclusive jurisdiction, involving the same parties and the same issues?

3. Does the I.C.C., rather than a state court, have primary and exclusive jurisdiction in matters requiring a determination of whether it would be reasonable to require a rail carrier to expend capital to reconstruct a rail line for the use of a shipper in interstate commerce?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The state statutes involved are §479.3, Code of Iowa, 1973, and §479.122, Code of Iowa, 1973. The federal statutes involved are the Interstate Commerce Act, 49 U.S.C. §1, et seq., and more particularly 49 U.S.C. §1(4), (10), (11), (13), (14), (17), (18), and (20); §8; and §9. Article VI, Clause 2 ("Supremacy Clause"), of the Constitution of the United States is also involved.

REASONS FOR GRANTING THE WRIT

I.

The Iowa Supreme Court Decision Erred In That It Failed To Recognize That The Interstate Commerce Act Has Preempted The Power Of State Courts Over Rail Carriers In Interstate Commerce In Matters Of Railroad Line Abandonment And Provision Of Car Service Over Those Lines.

The Iowa Supreme Court erroneously held that the State District Court for Webster County has subject matter jurisdiction to decide whether a rail carrier may be subject to damages for conduct found by a federal agency not to be unlawful.

Kalo has sued the Transportation Company under three theories: (1) alleged violation of §479.3, Code of Iowa, 1973, requiring railways to "furnish suitable cars to any and all persons who may apply therefore . . ."; (2) alleged violation of §479.122, Code of Iowa, 1973, rendering any railway liable for "damages sustained by any person . . ." because of the negligence of the railway; and (3) alleged tortious interference by the Transportation Company with the contractual relationships Kalo claimed it had with some of its customers. Kalo has never claimed the Transportation Company violated any federal statute.

The Interstate Commerce Act, 49 USC §1, et. seq.[1], has preempted state statutes and state common law in the

[1] Title 49, USC, was revised by Public Law 95-473. October 17, 1978. 49 USC §10101. et seq. The section headings of the new revised Act are correlated with the section headings of the pre-revision Act in the table of citations, *supra*. In the body of the argument, citations will be to the pre-revision Act.

fields of railroad line abandonment and provision of car service in interstate commerce. *Powell* v. *United States,* 300 U.S. 276, 287, 81 L.Ed. 643, 652, 57 S.Ct. 470 (1937) (adandonment); *Missouri Pacific RR. Co.* v. *Stroud,* 267 U.S. 404, 407-408, 69 L.Ed. 683, 685, 45 S.Ct. 243 (1925) (car service).

The undisputed, and only, evidence on the character of the commerce involved came from the testimony of a corporate officer of Kalo (Jerry Schnurr) who said Kalo's intrastate shipments were made by truck, and that the only use of rail transportation was for shipments in interstate commerce. (Transcript page 321, line 17, to page 322, line 2, Appendix page 33a.) The trial court affirmed this fact. (Trial Ct. Opinion page 2, Appendix page 13a.)

This is not a case involving failure to provide car service, for car service issues presume the physical ability to move cars over a line. (Trial Court Opinion page 12, Appendix page 21a.) That is, car service issues presume the existence of a physically operable line of railroad. No such line existed in this situation and the Commission found that the absence of a physically operable line did not result from any unlawful act of the Transportation Company. The Commission further found, in an unappealed order, that the cessation of service was not unlawful. In this case the Transportation Company lawfully imposed an embargo and took its line out of service because of physical conditions, and gave required notice to Kalo, the only shipper on the line. (Trial Court Opinion pages 3-6, Appendix page 15a.) The practice of instituting embargoes when lines become physically inoperable is well recognized. *Chicago & North Western Ry. Co.* v. *Union Packing Co.,* 373 F. Supp. 734, 736-737 (D. Nb. 1974); *Myers* v. *Arkansas & Ozarks Railway Corp.,*

185 F. Supp. 36, 41-42 (W.D. Ark. 1960); *Asbury* v. *Chesapeake & Ohio Railwap Company,* 314 F. Supp. 310, 312-313 (D.C. 1970).[2]

"'Car service' connotes the use to which vehicles of transportation are put; not the transportation service rendered by means of them." *Peoria & P. U. R. Co.* v. *United States,* 263 US 528, 533, 68 LEd 427, 430, 44 S.Ct. 194 (1923); *I.C.C.* v. *Oregon Pacific Industries, Inc.,* 420 US 184, 189, 43 L.Ed.2d 121, 125, 95 S.Ct. 909, 913 (1975). Car service statutes do not apply where freight service over a branch line is discontinued and abandoned. *Burlington Northern* v. *Department of Public Service,* 240 NW2d 554, 558-559 (Mn. 1976).

The line was lawfully abandoned pursuant to an order of the Interstate Commerce Commission entered *before* trial and judgment in this action. (Trial Court Opinion pages 19-22, Appendix pages 27a-30a; Def. Exhibit YYY, Apendix pages 33a-40a.) An "abandonment" of a rail line is governed exclusively by the provisions of the Interstate Commerce Act, 49 USCA §§1(18) and 1(20), and a suit for injunction in federal district court under 49 USCA §1(20) affords the only remedy for unlawful abandonment of a line. *Powell* v. *United States,* 300 U.S. 276, 287, 81 L.Ed. 643, 652, 57 S.Ct. 470 (1937)[3]

---

[2] Also *see, General Foods Corporation* v. *Baker,* 451 F.Supp. 873, 876-877 (D. Md. 1978); *Holt Motor Company* v. *Nicholson Universal S.S. Co.,* 56 F.Supp. 585, 590-592 (D. Mi. 1944); and *see, Eastern Railway Co.* v. *Littlefield,* 237 US 140, 144-145, 35 S.Ct. 489, 59 LEd 878, 883 (1915).

[3] Also *see Texas & P. R.I.* v. *Gulf C. & S. F. Ry.,* 270 US 266, 272-273 (1926); *S.H. & W. Lumber Co.* v. *California & O.C. R.R.,* 154 F. Supp. 152, 154 (D. Or. 1957); *Asbury* v. *Chesapeake & O. Ry.,* 315 F. Supp. 310, 312 (D.D.C. 1970).

Even if this case involved an unlawful abandonment, which the Commission specifically found not to be the case, Kalo would have to bring its action in federal district court or before the ICC. 49 USC §9. There are no Iowa statutes providing any remedy for abandonment of rail lines. (Trial Court Opinion page 14; Appendix page 23a.) Kalo never sought an injunction or damages in Federal District Court.

To reach issues of car service, it must be assumed that a physical line exists, and the Commission determined that a physical line ceased to exist because of conditions beyond the Transportation Company's control. Even if it is assumed *arguendo* that this is a car service case, 49 U.S.C. §§1, 8, and 9 cover the whole field of railroad car service in interstate commerce and enactment of that federal legislation rendered invalid state statutes and the common law to the extent that they purport to regulate railroad car service in interstate commerce. *Hampton* v. *St. Louis, Iron Mountain and Southern Ry. Co.*, 227 US 456, 465, 57 LEd 596, 598, 33 S. Ct. 263 (1912); *Chicago, Rock Island & Pac. Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 US 426, 433, 436, 33 S. Ct. 174, 57 LEd 284 (1912); *Missouri Pacific RR. Co.* v. *Stroud*, 267 US 404, 407-408, 69 LEd 683, 685, 45 S.Ct. 243 (1925); *United States* v. *New River Company*, 265 US 533, 541-542, 68 LEd 1165, 172, 44 S.Ct. 610 (1923).

Indeed, even if a party was claiming damages under 49 USC §1 (11), the car service statute, it could pursue its damage claim *only* before the Interstate Commerce Commission or in a Federal District Court.[4] 49 USCA §9;

---

[4] This requirement of 49 USCA §9 was not discussed in *Chicago, Rock Island & Pac. Ry. Co.* v. *Linwood Stone Products Co.*, 138 NW2d 902 (Ia. 1965), or in *Baird Brothers* v. *Minneapolis & St. Louis Railroad Co.*, 181

Interstate Commerce Comm. v. *Atlantic Coast Line Co.*, 383 US 576, 579, 16 LEd2d 109, 86 S.Ct. 1000 (1966).[5]

The Iowa Supreme Court erroneously ruled in general terms that Iowa may regulate service in interstate commerce so long as the regulation is not inconsistent with and does not interfere with the provisions of the Interstate Commerce Act. (Court of Appeals Opinion, page 5, Appendix page 8a.) In the context of this case the result of this erroneous ruling is to give a state district court the power to award damages for failure to provide car service where there are unappealed findings by the Commission that the cessation of service was not unlawful.

In support of its contention, the Court relied upon a series of cases decided prior to the Esch Car Service Act and the Transportation Act of 1920, which gave the Commission exclusive jurisdiction over provision of car service and railroad line abandonment. *Missouri Pacific R.R. Co.* v. *Stroud*, 267 US 404, 407-408, 69 LEd 683, 685, 45 S.Ct. 243 (1925); *Powell* v. *United States*, 300 US 276, 287, 81 LEd 643, 652, 57 S.Ct. 470 (1937).[6] 49 USC

---

[4] (Continued)
Iowa 1104, 1123, 165 NW 412 (1917), which were relied on by the Iowa Court of Appeals.

[5] Also *see*, *Burlington Northern, Inc.* v. *Department of Public Service*, 240 NW2d 554, 559 (Mi. 1976); *Auracher* v. *Omaha & St. L. R. Co.*, 102 F. 1, 2 (Cir. Ct. S. D. Ia. 1900).

[6] The Iowa Court of Appeals mistakenly relied upon *Pennsylvania R.R. Co.* v. *Puritan Coal Mining Co.*, 237 US 121, 3 S.Ct. 484, 59 LEd 867 (1915), *Illinois Central R.R. Co.* v. *Mulberry Hill Coal Co.*, 238 US 275, 59 LEd 1306, 35 S.Ct. 760 (1915), and *Pennsylvania R. Co.* v. *Sonman Shaft Coal Co.*, 242 US 120, 61 LEd 188, 37 S.Ct. 46 (1916).

§1(11) is the federal statute requiring carriers to provide "adequate car service" to shippers. That paragraph was added to the ICC Act in 1917 (Esch Car Service Act) and was amended to read as it now stands by the Transportation Act of 1920. 49 U.S.C.A. §1(11), Historical Notes, p. 117. The cases relied upon by the Iowa Court of Appeals in the opinion affirmed by the Supreme Court of Iowa therefore do not address or take account of the federal car service statute, 49 USC §1(11), and cannot be relied upon on the issue of whether state power has been preempted by the ICC Act in the area of provision of car service in interstate commerce.

Cases decided after the Transportation Act of 1920 hold that federal statutes have preempted the field of provision of car service in interstate commerce and that state law is invalid in that area. *Missouri Pacific RR. Co.* v. *Stroud,* 267 US 404, 407-408, 69 LEd 683, 685, 45 Sup. Ct. 243 (1925); *United States* v. *New River Company,* 265 US 533, 541-542, 68 LEd 1165, 1172, 44 Sup. Ct. 610 (1923).

In *Missouri Pacific Railroad Company* v. *Stoud, Supra,* at 267 US 407-408, 69 LEd 685, the Supreme Court of the United States said:

> "Congress in the exertion of its power over commerce among the states, has enacted laws for the regulation of the furnishing of cars to shippers. Interstate Commerce Act §1, (3), (4), (6), (10), (11), (12), (14); §3 (1); §15 (1). See United States v. New River Co. 265 U.S. 533, 451, 68 L.Ed. 1165, 1172, 44 Sup. Ct. Reg. 610 . . . The state law has no application to the furnishing of cars to shippers for the transportation of freight in interstate commerce. (Citations omitted)

49 U.S.C. §1(17) (a) provides:

> *"Provided, however,* that nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this chapter and except as otherwise provided in this chapter."

Nothing in §17(a) authorizes what is happening here. §17(a) does not say and should not be construed to mean that a state may exercise the power to determine whether a carrier is providing reasonable interstate service. Such a construction deprives the limiting word "intrastate" of any meaning.

The exclusive domain of Federal statutes in the area of regulation of railroad car service in interstate commerce has been recognized by the high courts of states other than Iowa.[7] The interstate commerce operations of rail carriers should be treated uniformly in all states, including Iowa.

---

[7] *In Re Rules and Regulations Nos. 31 and 32,* 225 NW2d 401, 408 (Nb. 1975); *Burlington Northern, Inc.* v. *Department of Public Service,* 240 NW2d 554, 556-559 (Mn. 1976); *Chicago, M., St. P. & P. R. Co.* v. *Michigan Pub. Serv. Commission,* 50 NW2d 884, 887 (Mi. 1952); *Davis* v. *Keystone Steel & Wire Co.,* 148 NE 47, 50-51 (Ill. 1925); *Louisville & N.R. Co.* v. *Brashear,* 289 S.W. 1094, 1098-1099 (Ky. 1927). It has been held that 49 USCA §§ 1(10) and 1(11), as administered by the I.C.C., govern whether the frequency of service may be reduced on a branch line carrying 82.1% interstate traffic. *Burlington Northern, Inc.* v. *Department of Public Service, supra,* at 240 NW2d 557-558. The Supreme Court of Michigan has ruled that a state regulatory agency has no power to require a rail carrier to operate an unprofitable line

The Iowa Supreme Court decision in the present case allows an Iowa State District Court to penalize a rail carrier by awarding damages for failure to expend substantial capital funds to reconstruct a railroad line running to Kalo's plant site for the purpose of improving Kalo's interstate rail service. This ruling, if not overturned, allows state courts to regulate interstate rail service by penalty. In the present case this ruling also allows a state court to overrule a prior decision of the Interstate Commerce Commission on issues concerning interstate commerce (Section II *infra*).

II.

The Iowa Supreme Court Decision Erred In That It Refused To Recognize That In The Kalo Line Abandonment Proceedings The I.C.C. Decided Issues Adversely To Kalo That Are Determinative Of Kalo's Claims In This Lawsuit, And Consequently The Supremacy Clause Of The Constitution And The Doctrine Of Res Judicata Prevent Kalo From Relitigating Those Issues.

It is well established in Iowa as well as other jurisdictions that where particular issues have already been litigated in one proceeding between the parties, the doctrine of collateral estoppel (issue preclusion) may be used defensively to bar a party to the first proceeding from relitigating those issues in a subsequent proceeding. *Goolsby* v. *Derby,* 189 NW2d 909, 914 (Iowa 1971); *B & B Asphalt Co.* v. *T. S. McShane Co.,* 242 NW2d 279, 286 (Iowa, 1976); Moore's Federal Practice, Vol. 1B, ¶0.405(1).

---

[7] (Continued)
which, although it would have benefited intrastate commerce, was primarily intended to improve interstate rail service afforded to the area in question. *Chicago, M., St. P. & P. R. Co.* v. *Michigan Public Service Commission, supra,* at 50 NW2d 887.

Issues that are determinative of the present lawsuit have already been decided by a valid and final judgment of the I.C.C. in the Kalo Line Abandonment Proceedings, AB-1 (SUB-No. 24), in which both the Transportation Company and Kalo were parties. (ICC Order entered April 30, 1976, and affirmed by I.C.C. Order entered September 23, 1976, Def. Exhibit YYY, Appendix pages 33a-52a; Trial Court Opinion pages 19-22, Appendix pages 29a-30a). Quoting from the I.C.C. order entered April 30, 1976, the trial court held that the I.C.C. made a final determination of fact "that the cessation of service occurred because of conditions over which applicant (Defendant Railroad) had no control, not because of willful abandonment," and that "due to the soil condition and mining activities in the area, the repairs would not be sufficient to insure continuous operations on the line." (Tr. Ct. Op. p. 21, Appendix pages 28a, 29a.) The trial court further held that, "It was upon a finding that Defendant Railroad had done nothing illegal or negligent that the final determination of the ICC was reached." (Tr. Ct. Op. p. 21, Appendix page 29a.) The I.C.C. order held that ". . . continued operation of the line would be an unnecessary burden on applicant and on interstate commerce. . . ." In other words, the Commission found that the cessation of service was beyond the control of the Transportation Company and that future public convenience and necessity did not require continued operation, and the Commission permitted abandonment because repair, future maintenance, and continued operation would have been an undue burden. The order of the Commission was not appealed.

In abandonment proceedings before the Interstate Commerce Commission the question of whether the present

condition of a line is due to a railroad's neglect or due to conditions beyond its control is always an issue of paramount importance. *General Foods Corp.* v. *Baker,* 451 F.Supp. 873, 876 (D. Md. 1978); *Missouri-Kansas-Texas Railroad Company Abandonment Between Altos and Forgan, Oklahoma,* 338 ICC 728, 743-748 (1971).

An unappealed determination of these factual issues by the Interstate Commerce Commission is as effective for the purposes of issue preclusion as determination by a court. Constitution of the United States, Article VI, Clause 2 ("Supremacy Clause"); *Baltimore & Ohio Railroad Company, et al.* v. *New York, New Haven & Hartford Railroad Company,* 196 F.Supp. 724, 744-745 (S.D.N.Y. 1961); *Seatrain Lines, Inc.* v. *Pennsylvania R. Co., et al.,* 207 F2d 255, 259 (3rd Cir. 1953).[8] A party that had an opportunity to litigate an issue before a federal agency may take advantage of statutory provisions for appeal of the agency's decision, but the party may not relitigate the issue by commencing an action in a court of original jurisdiction. *Siba Corp.* v. *Weinberger, Secretary of Health, Education & Welfare, et al.,* 412 U.S. 640, 644, 93 S.Ct. 2495, 37 LEd 2d 230 (1973); *United States* v. *Willard Tablet Co.,* 141 F2d 141, 143 (7th Cir. 1944).

The Federal Court of Appeals had jurisdiction to review the final order of the I.C.C. 28 USC §§2342(5) and 2321(a). No appeal was filed in the Court of Appeals.

---

[8] Also, *see Board of Supervisors, Carroll County* v. *Chicago and Northwestern Transportation Company,* 260 NW2d 813, 815 (Ia. 1977); *United States* v. *State of South Dakota,* 212 F2d 14, 16 (8th Cir. 1954); *Landreth* v. *Wabash R. Co.,* 153 F2d 98, 100 (7th Cir. 1948), cert. denied, 328 U.S. 855, 55 S.Ct. 1345, 90 LEd 1627.

Instead, Kalo has in effect prosecuted an appeal in the Iowa District Court for Webster County.

Thus, the very issue upon which Kalo has proceeded in a state court action has been determined with finality by a federal agency with exclusive jurisdiction over the issues of service over the line, the continued existence of the line, and the events leading up to the presentation of these issues. Clearly a state court lacks jurisdiction over the subject matter of this case.

III.

The Iowa Supreme Court Decision Erred In That It Ignored The Fact That The Interstate Commerce Commission Has Primary Jurisdiction Over Issues Necessary To The Proof Of Kalo's Claims.

"National rather than local control of interstate railroad transportation has long been the policy of Congress." *Chicago* v. *Atchison, Topeka & Sante Fe R. Co.*, 357 U.S. 77, 87, 2 LEd 2d 1174, 1182, 78 S. Ct. 1063 (1958). The Interstate Commerce Commission has primary, if not exclusive, jurisdiction over "issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by (the) Act." *Interstate Commerce Comm.* v. *Atlantic Coast Line Co.*, 383 U.S. 576, 579, 16 LEd 2d 109, 114, 86 S. Ct. 1000 (1966). If an action for damages in Federal District Court involves issues that fall within the primary jurisdiction of the Interstate Commerce Commission, those issues must be referred to the Commission for determination. *Interstate Commerce Comm.* v. *Atlantic Coast Line Co.*, 383 U.S. 576, 579, 16 LEd 2d 109, 114, 86 S.Ct. 1000 (1966). There is no mechanism allowing referral of issues from a state court to the ICC.

Assuming *arguendo* that this is a car service case and that a state court can in some instances have concurrent jurisdiction with the I.C.C. over car service where elements of intrastate commerce are present, this case wolud still have to be dismissed in state court because (a) there was no intrastate commerce and (b) the Commission had already decided that the cessation of service was not unlawful. The trial court held the issues for decision here involved questions of reasonableness of the Transportation Company's conduct and were for the Commission to decide. Even a federal court loses jurisdiction to the I.C.C. in a car service case when the issue is whether a rail carrier's rule or practice is reasonable. Federal courts have jurisdiction only when the rule or practice of the rail carrier is admittedly reasonable and the only issue to be decided is whether the carrier adhered to the rule or practice. *Midland Valley RR. Co.* v. *Barkley, et al.,* 276 U.S. 482, 484-487, 72 L.Ed. 664, 666-667, 48 S.Ct. 342, (1927); *U.S.* v. *New River Co.,* 265 U.S. 533, 541-542, 68 L.Ed. 1165, 1172, 44 S.Ct. 610 (1923).[9]

Even if this case was held to be one questioning the carrier's practices, issues as to reasonableness of practices have been held to be for the Commission. The I.C.C. has been held to have primary jurisdiction to decide whether a rail carrier may institute a new practice of providing service to a shipper on a less

---

[9] Also, *see Morrisdale Coal Co.* v. *Pennsylvania R.R. Co.,* 230 U.S. 304, 313-314, 57 LEd 1494, 1497, 33 S.Ct. 938 (1912); *Loomis* v. *Lehigh Valley RR. Co.,* 240 U.S. 43, 50-51, 60 LEd 517, 519-520, 36 S.Ct. 228 (1916); *I.C.C.* v. *Baltimore & Annapolis RR. Co.,* 398 F.Supp. 454, 467-468 (D. Md. 1975), aff'd 537 F2d 77 (4th Cir.) cert. denied 429 U.S. 859, 97 S.Ct. 159, 50 LEd 2d 136 (1976).

frequent basis. *Elgin Coal Co.* v. *Louisville & Nashville R.R. Co.,* 411 F2d 1043, 1045-1046 (6th Cir. 1969). The Supreme Court of the United States held a state court could not entertain an action to require a rail carrier to construct inside doors on its produce hauling cars because the Interstate Commerce Commission had primary jurisdiction over the issue. *Loomis* v. *Lehigh Valley R.R. Co.,* 240 U.S. 43, 48-51, 60 L.Ed. 517, 519-520, 36 S.Ct. 228 (1916).[10]

Even if one assumes that the Iowa District Court for Webster County did at one time have concurrent jurisdiction with the I.C.C., it has no jurisdiction now because it cannot act in a manner inconsistent with an order of the I.C.C. *Far East Conference* v. *United States,* 342 U.S. 570, 574-575, 96 L.Ed. 574, 72 S.Ct. 492 (1952); 49 USC §1 (17) (a). The Iowa Supreme Court's disregard of an existing, unchallenged order of the I.C.C. amounts to an attempt to enlarge the jurisdiction of Iowa district courts in a manner not permitted by Title 49 of the United States Code.

---

[10] Both *Pennsylvania RR. Co.* v. *Puritan Coal Mining Co.,* 237 U.S. 121, 130, 3 S.Ct. 484, 59 LEd 867, 872 (1915) and *Illinois Central RR. Co.* v. *Mulberry Hill Coal Co.,* 238 U.S. 275, 280-281, 59 LEd 1306, 1309, 35 S.Ct. 760 (1914), relied upon in the Iowa Court of Appeals opinion, were distinguished in the later case of *Midland Valley RR. Co.* v. *Barkley,* 276 U.S. 482, 486-487, 72 LEd 664, 667, 48 S.Ct. 342 (1927), by the Hon. Justice Brandeis on the grounds that in neither *Puritan* nor *Illinois Central* "was the reasonableness of the carriers' practice in controversy." Likewise, *Pennsylvania R. Co.* v. *Sonman Shaft Co.,* 242 U.S. 120, 125-126, 37 Sup. Ct. 46, 61 LEd 188 (1916), also relied upon by the Iowa Court of Appeals, did not involve the question of the reasonableness of the defendant's practice. *See, Spence* v. *Baltimore & Ohio Railroad Company,* 360 F2d 887, 890 (7th Cir. 1966).

CONCLUSION

The Interstate Commerce Act has preempted state law in the subject matter area of this case. Kalo's sole remedies under the Act lie in federal district court or before the I.C.C. Furthermore, the doctrine of primary jurisdiction gives the I.C.C. exclusive jurisdiction over issues that are determinative of Kalo's claims. Yet in this case the Iowa Supreme Court has not only refused to follow the federal doctrines of preemption and primary jurisdiction, but has also refused to give effect to the I.C.C. orders that collaterally estop Kalo from relitigating issues necessary to the proof of its claims. The position taken by the Iowa Supreme Court on the issues presented in this petition is an improper attempt to enlarge the jurisdiction of the state district courts of Iowa by refusing to follow the governing federal law.

For these reasons, and others set forth above in this pertition, petitioner respectfully prays that a Writ of Certiorari be granted to review the judgment of the Supreme Court of Iowa.

Respectfully submitted,

LOUIS T. DUERINCK
JAMES P. DALEY
STUART F. GASSNER
400 W. Madison Street
Chicago, Illinois 60606,
Telephone: (312) 454-6506,

FRANK W. DAVIS, JR.
BRUCE E. JOHNSON
2600 Ruan Center,
Des Moines, Iowa 50309
Telephone: (515) 243-6251

FILED
FEB 28 1980

79-1336

No.

In the

Supreme Court of the United States

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

AMENDED TABLE OF CITATIONS TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

LOUIS T. DUERINCK
JAMES P. DALEY
STUART F. GASSNER
400 West Madison Street
Chicago, Illinois 60606
Telephone: (312) 454-6506

FRANK W. DAVIS, JR.
BRUCE E. JOHNSON
2600 Ruan Center
Des Moines, Iowa 50309
Telephone: (515) 243-6251
Attorneys for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

IN THE

SUPREME COURT OF THE UNITED STATES

No.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

AMENDED TABLE OF CITATIONS TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

The Table of Citations as printed in the Petition for a Writ of Certiorari contained eleven citations to Title 49, U.S.C., as it existed before revision by Public Law 95-473, October 17, 1978, 49 U.S.C. §10101, et. seq. A substituted Table of Constitutional Provisions and Statutes is set out below and correlates the section headings of the new revised Act with the section headings of the pre-revision Act. Otherwise, the Table of Constitutional Provisions and Statutes is identical to the Table found on page v of the Petition for Writ of Certiorari previously filed.

CONSTITUTIONAL PROVISIONS AND STATUTES

PAGE

Interstate Commerce Act,

49 U.S.C. §10102 formerly §1(10) 7, 14
49 U.S.C. §11121 formerly §1(11) 7, 11, 13, 14
49 U.S.C. §11121 formerly §1(13) 7
49 U.S.C. §11901 formerly §1(17)(a) 7, 14, 20
49 U.S.C. §10501 formerly §1(17)(a) 7, 14, 20
49 U.S.C. §10901 formerly §1(18) 7, 10
49 U.S.C. §10902 formerly §1(18) 7, 10
49 U.S.C. §10907 formerly §1(18) 7, 10
49 U.S.C. §11702 formerly §1(20) 7, 10
49 U.S.C. §11704 formerly §1(20) 7, 10
49 U.S.C. §11705 formerly §8 .....7, 11
49 U.S.C. §11705 formerly §9 .....7, 11

79-1236

Supreme Court, U.S.
FILED
FEB 28 1980
JR., CLERK

No.

In the

Supreme Court of the United States

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

LOUIS T. DUERINCK
JAMES P. DALEY
STUART F. GASSNER
400 West Madison Street
Chicago, Illinois 60606
Telephone: (312) 454-6506

FRANK W. DAVIS, JR.
BRUCE E. JOHNSON
2600 Ruan Center
Des Moines, Iowa 50309
Telephone: (515) 243-6251
Attorneys for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

INDEX TO APPENDIX

PAGE

APPENDIX:

Order of the Supreme Court of Iowa 1a

Opinion of the Court of Appeals of Iowa 2a-12a

Findings of Fact, Conclusions of Law, and Judgment of the District Court of the State of Iowa in and for Webster County 12a-33a

April 30, 1976, Order of the Interstate Commerce Commission 33a-40a

September 23, 1976, Order of the Interstate Commerce Commission 40a-41a

Excerpt of Testimony of Plaintiff's Officer Jerry Schnurr 42a

Constitutional Provisions and Statutes 42a-52a

Answer of Chicago and Northwestern Transportation Company to Plaintiff's Petition 52a-56a

Answer of Chicago and Northwestern Transportation Company to Plaintiff's Amendment to Petition 57a-64a

Motion for Summary Judgment Filed by Chicago and Northwestern Transportation Company 64a-67a

Motion to Dismiss Filed by Chicago and Northwestern Transportation Company 68a-76a

APPENDIX

IN THE SUPREME COURT OF IOWA

KALO BRICK AND TILE COMPANY,
Plaintiff-Appellant-Resister,

vs.

CHICAGO NORTHWESTERN TRANSPORTATION COMPANY,
Defendant-Appellee-Applicant.

No. 2-60942
Filed Nov 30 1979

ORDER

After consideration by the court en banc defendant-appellee's application for further review is hereby overruled and denied.

Done this 30th day of November, 1979.

The Supreme Court of Iowa
By /s/ W. W. Reynoldson
W. W. Reynoldson, Chief Justice

Copies to:
Bruce E. Johnson
2600 Ruan Center
Des Moines, Iowa 50309

M. G. Blackburn
142 North 9th Street
Fort Dodge, Iowa 50501
John H. Mitchell
200 North 10th Street
Fort Dodge, Iowa 50501

IN THE COURT OF APPEALS OF IOWA

KALO BRICK & TILE COMPANY,

Plaintiff-Appellant,

vs.

CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY and JACK CHMELER,

Defendants-Appellees.

Filed October 18, 1979

Appeal from Webster District Court - Russell J. Hill, Judge.

Plaintiff appeals judgment for defendant in tort action based on failure to provide adequate railroad service. Reversed and Remanded.

M. Gene Blackburn & John H. Mitchell of Murray & Blackburn, P.C., of Fort Dodge, for plaintiff-appellant.

Bruce E. Johnson of Gamble, Riepe, Burt, Webster & Davis, of Des Moines, for defendants-appellees.

Heard by Oxberger, C.J., Donielson, Shell and Johnson, JJ. Carter, J., takes no part.

DONIELSON, J.

Plaintiff, Kalo Brick and Tile Company, appeals judgment for defendant, Chicago and Northwestern Transportation Company, in a tort action based on alleged failure to provide adequate rail service. For reversal, plaintiff asserts the action was not within the exclusive or primary jurisdiction of the Interstate Commerce Commission (ICC), ICC orders in the abandonment proceeding are not preclusive of issues presented in the trial court, and a remand order of the federal district court precludes the defendant from challenging the jurisdiction of the trial court. We reverse and remand for a new trial.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4.

I.

In April 1973 defendant-railroad discontinued service on a branch line serving plaintiff's plant after numerous interruptions of service due to earth slides. Plaintiff notified its customers, shortly thereafter, it was going out of business due to its inability to ship by rail. It is undisputed the railroad had not yet made a decision to abandon permanently the branch line. In November 1973, subsequent to plaintiff going out of business, defendant applied to the ICC for permission to abandon the branch line. An ICC order, entered April 30, 1976, directed the issuance of a certificate of abandonment and forbid any abandonment prior to the effective date of the certificate. The April 30 ICC order found plaintiff to be a protestant in default, but a further inquiry by plaintiff's counsel was treated as a petition for reconsideration. In September 1976 the ICC entered an order denying the petition for reconsideration and setting the effective date of the abandonment at 20 days from the date of the service of the order.

Plaintiff brought this action in September 1974. In July 1977 the trial court entered judgment for the defendant, making findings of fact concerning the earth slides and the ICC proceedings. The trial court concluded that the question in the case was the reasonableness of the railroad's abandonment of direct rail service to plaintiff's plant; a question held to be within the jurisdiction of the ICC, not the state court. Further, the defendants were not found to be precluded from challenging the Iowa court's jurisdiction by the federal court's remand order because that order was based on lack of diversity jurisdiction, not the merits of the jurisdictional issue. Finally, the trial court concluded that the ICC's factual determination of the reasonableness of the railroad's abandonment collaterally estopped plaintiff from relitigating that issue. Judgment was entered dismissing the petition.

II.

Plaintiff has moved to strike divisions IV, V, VI, and IX of defendant's brief, asserting those divisions raise issues not assigned as error in its brief and argument or raised by defendant in a cross-appeal. It is plaintiff's contention that defendant is asking in these divisions this court for relief not granted by the trial court. A party that neither appeals nor cross-appeals can have no greater relief or redress on appeal than accorded it by the trial court. *See Bartels* v. *Hennessey Brothers, Inc.,* 164 N.W. 2d 87, 92 (Iowa 1969). *See also In re Marriage of Novak,* 220 N.W.2d 592, 598 (Iowa 1974); *Randolph Foods, Inc.* v. *McLaughlin,* 253 Iowa 1258, 1277, 115 N.W.2d 868, 879 (1962); *Schlotfelt* v. *Vinton Farmers' Supply Co.,* 252 Iowa 1102, 1115, 109 N.W.2d 695, 702 (1961). Accordingly, we hold defendant is entitled, if at all, only to the relief accorded by the trial court—dismissal of the action due to absence of jurisdiction. We grant plaintiff's motion to strike divisions IV, V, VI, and IX of defendant's brief.

III.

The starting point of our analysis is whether defendant is precluded from raising the issue of the trial court's jurisdiction following the remand by the federal district court. Defendant removed the case to federal district court by petition for removal. Plaintiff filed a motion to remand and a motion to dismiss was then filed by defendant. The motion to dismiss alleged the federal district court lacked subject matter jurisdiction of the action.

The federal district court remanded the case on jurisdictional grounds because of the absence of diversity of citizenship. This ruling did not decide, however, the state court had jurisdiction but merely that the federal court could not hear the case. Since this issue is separate from the one on appeal, the federal court's ruling is not res judicata and defendant is not precluded from raising the issue of the state court's jurisdiction to hear this

case. *Mauer* v. *Rohde,* 257 N.W.2d 489, 497 (Iowa 1977) (quoting *Schneberger* v. *United States Fidelity & Guaranty Co.,* 213 N.W.2d 913, 917 (Iowa 1973)). We move to that issue.

IV.

The central and controlling issue in this case is whether the trial court possessed jurisdiction to hear plaintiff's claims, concerning violations of sections 479.3 and 479.122, The Code 1973, involving a railroad's duty to furnish cars, and tortious interference with plaintiff's business. In resolving this issue, we must first determine whether the Interstate Commerce Act preempts these statutes and the common law on which plaintiff relies for relief. If we conclude the state court has concurrent jurisdiction, we must then decide whether the doctrine of primary jurisdiction is applicable to this case such that the issues presented are exclusively within the jurisdiction of the ICC. After reviewing the arguments and cases cited by the parties, we conclude the Interstate Commerce Act does not preempt state statutory or common law and the doctrine of primary jurisdiction is not applicable to this case.

The Iowa Legislature has imposed on the railroads the unqualified and unconditional duty to furnish car service and transportation to all persons who apply. §§ 479.3, .122. Defendant argues this statutory duty has been preempted by the Interstate Commerce Act, 49 U.S.C. §§1, 8, 9 (1976) (current versions in relevant part at 49 U.S.C.A. §§ 10501, 11705 (Supp. 1979)), which rendered invalid state statutes and common law to the extent they purport to regulate railroad car service in interstate commerce. We do not agree the Interstate Commerce Act preempted the particular sections relied on by plaintiff, but view them as complimentary, alternative means of relief for injured parties.

We find support for our position in cases of the United States Supreme Court and the Iowa Supreme

Court. In *Pennsylvania Railroad Coal Mining Co.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 35 S. Ct. 484, 59 L. Ed. 867 (1915), the Supreme Court, interpreting the various sections of the Interstate Commerce Act, held that state and federal courts have concurrent jurisdiction, without a preliminary finding by the ICC, of a suit brought by a shipper under state common law against an interstate carrier to recover damages arising out of the latter's duty to furnish cars needed by the shipper. *Id.* at 132; 35 S.Ct. at 488; 59 L.Ed. at 873; *Eastern Railroad* v. *Littlefield*, 237 U.S. 140, 143, 35 S.Ct. 489, 490, 59 L. Ed. 878, 882 (1915). Focusing on section 22 of the Act, the Court found all remedies existing under state common law are preserved unless they are inconsistent with or interfere with remedies contained in the Act. *Puritan*, 237 U.S. at 132; 35 S.Ct. at 488; 59 L. Ed. at 872-73. The Court discussed the effect of section 22[1] in the following language:

---

[1] The Interstate Commerce Act was revised without substantive change in 1978. Act of Oct. 17, 1978, Pub. L. 95-473, §1, 92 Stat. 1337. Section 22 was repealed except as it vested in the ICC functions related to the transportation of oil. Act of Oct. 17, 1978, Pub. L. 95-473, §4(b), (c), 92 Stat. 1466-1470. The revised Interstate Commerce Act, however, contains the following language that substantially retains the effect of sections 22 and 1(17(a) of the old Act.

> This subtitle [outlining the general jurisdiction of the ICC] does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter unless the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle.

49 U.S.C.A. § 10501(c) (Supp. 1979). This organizational revision of the Act does not affect our analysis or holding. Act of Oct. 17, 1978, Pub. L. 95-473, §3, 92 Stat. 1466.

> That proviso was added at the end of the statute, not to nullify other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by the statute. It was also intended to preserve existing remedies, such as those by which a shipper could, in a state court, recover for damages to property while in the hands of the interstate carrier; damages caused by delay in shipment; damages caused by failure to comply with its common-law duties and the like. But for this proviso to §22 it might have been claimed that, Congress having entered the field, the whole subject of liability of carrier to shippers in interstate commerce had been withdrawn from the jurisdiction of the state courts, and this clause was added to indicate that the commerce act, in giving rights of action in Federal courts, was not intended to deprive the state courts of their general and concurrent jurisdiction.

Id. See also Pennsylvania Railroad v. *Sonman Shaft Coal Co.*, 242 U.S. 120, 123-25, 37 S.Ct. 46, 47-48, 61 L. Ed. 188, 191 (1916). The *Puritan* analysis was subsequently applied in *Illinois Central Railroad* v. *Mulberry Hill Coal Co.*, 238 U.S. 275, 35 S.Ct. 760, 59 L. Ed. 1306 (1915), to allow recovery under a state statute for a carrier's failure to furnish cars. *Id.* at 281-83, 35 S.Ct. at 763-64, 59 L. Ed. at 1309-10.

In accordance with *Puritan*, the Iowa Supreme Court in *Baird Brothers* v. *Minneapolis & St. Louis Railroad*, 181 Iowa 1104, 169 N.W. 412 (1917), held that in suits brought for the enforcement of rights concerning interstate commerce but not for specific performance of provisions of the Interstate Commerce Act, an Iowa district court has concurrent jurisdiction with federal courts. *Id.* at 1122, 169 N.W. at 418. The remedy sought to be enforced, the court concluded, did not conflict with the

Interstate Commerce Act and no burden was placed on interstate commerce. *Id.* It is clear, then, that remedies existing under state statute or state common law are preserved unless they are inconsistent with or interfere with remedies contained in the Interstate Commerce Act. *Baird,* 181 Iowa at 1117; 165 N.W. at 416. *See State Public Utilities Commission* v. *Baltimore & Ohio Southwestern Railroad,* 281 Ill. 405, 412-13, 118 N.E. 81, 84 (1917). As the supreme court in *Baird* stated:

> There is nothing in the [Interstate Commerce Act] the enforcement of which would interfere with or abridge the rights of the shipper in demanding his right to reasonable shipping facilities, such as are in controversy here and to recover damages. A shipper's demanding of the defendant reasonable shipping facilities does not abridge or interfere with, nor is it inconsistent with, the provisions of the Commerce Act.

Baird, 181 Iowa at 1117, 165 N.W. at 416.

An analogous case decided by the Iowa Supreme Court is *Chicago, Rock Island & Pacific Railroad* v. *Linwood Stone Products Co.,* 258 Iowa 1378, 138 N.W.2d 902 (1965). In that case, the supreme court held the Iowa district court had concurrent jurisdiction with the federal court to decide a question involving a counterclaim, based on the railroad's alleged failure to furnish clean cars, in an action by the railroad to recover demurrage on cars. *Id.* at 1382; 138 N.W.2d at 905. The underlying rationale of these cases is that as long as the state statute or common law is not inconsistent with federal law and does not attempt to regulate interstate commerce, state and federal courts have concurrent jurisdiction.

Defendant seeks to distinguish *Puritan* and *Baird Brothers* by pointing out they were decided without a consideration of the effect of the Hepburn Act and contends the case of *Chicago, Rock Island & Pacific Railway* v. *Hardwick Farmers Elevator Co.,* 226 U.S. 426, 33 S.Ct.

174, 57 L. Ed. 284 (1913), determined the effect of that act on the power of states to regulate car service in interstate commerce. Not only is *Hardwick* inapposite because of its facts, but there is direct authority contrary to such contention.

Specifically, in *Pennsylvania Railroad* v. *Sonman Shaft Coal Co.*, 242 U.S. 120, 3 S.Ct. 46, 61 L.Ed. 188 (1916), the Supreme Court held that an action for failure to furnish sufficient cars "may be enforced in either a federal or state court without any preliminary finding by the Commission, and this whether the carriers' default was a violation of its common law duty existing prior to the Hepburn Act of 1906, or of the duty prescribed by that act . . . ." *Id.* at 124, 37 S.Ct. at 48, 61 L. Ed. at 191. Moreover, the Supreme Court in *Illinois Central Railroad* stated:

> It is true that the *Puritan Case* arose before the passage of the Hepburn Act of 1906; but there is nothing in the amendments introduced by that Act to affect the jurisdiction of the state court in an action as the present.

238 U.S. at 283, 35 S.Ct. at 763, 59 L. Ed. at 1310.

Lastly, in a case concerning jurisdiction of actions involving the failure to furnish cars, the Illinois Supreme Court stated:

> The law as settled by the Supreme Court of the United States,—the final authority on the question,—is, that a State statute requiring an inter-State carrier to furnish cars at points within the State within a reasonable time is in entire harmony with the Hepburn amendment of the Inter-State Commerce act, and the State and Federal courts have concurrent jurisdiction of actions for a failure to perform the duty . . . .

State Public Utilities Commission v. *Baltimore & Ohio Southwestern Railroad,* 281 Ill. 405, 413, 118 N.E. 81, 84

(1917). These cases unequivocally support the view adopted here that there is no preemption of state law, even after consideration of the Hepburn Amendment.

We find the other cases cited by defendant unpersuasive as they do not address precisely the issue of this case. This is not a question of a regulatory state state law in conflict with a federal law. If that were the case, it could not be gainsaid that federal law is supreme, rendering state law void. Rather, this state law is remedial only and exerts no burden on interstate commerce, nor does it interfere with regulatory powers and duties of the ICC. This same line of reasoning is equally applicable to the tortious interference claim as it is a remedy provided by Iowa common law. Statutory and common law grounds relied on by plaintiff's relief are not preempted by the Interstate Commerce Act.

V.

The rationale supporting our holding that the state court has concurrent jurisdiction with the federal court to hear this case leads us also to conclude the doctrine of primary jurisdiction is inapplicable to this case and there need be no deferral to the ICC. Plaintiff has asserted primarily three grounds for relief: The railroad's violation of statutory duty to furnish cars under section 479.3; the railroad's negligent maintenance of tracks and roadbeds; and tortious inference with conduct of plaintiff's business. Analysis of these questions does not require any administrative expertise; thus deferral to ICC is unnecessary.

The principles underlying the doctrine of primary jurisdiction are set forth in *Far East Conference* v. *United States*, 342 U.S. 370, 72 S.Ct. 492, 96 L. Ed. 576 (1952):

> [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should

> not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciaries are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Id., 342 U.S. at 745-52, 72 S.Ct. at 494, 96 L. Ed. at 582 (1952).

We find the grounds asserted for relief raise issues of fact coming within the conventional experience of judges and do not require exercise of administrative discretion. *Linwood Stone Products,* 258 Iowa at 1389-90; 138 N.W.2d at 908; *see Johnson* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad,* 400 F.2d 968, 972 (9th Cir. 1968). Regarding defendant's failure to furnish car service as a violation of section 479.3, we discern no need for the unique administrative expertise of the ICC to decide whether car service was not provided or the railroad was negligent in its track maintenance. *Linwood Stone Products,* 258 Iowa at 1389-90, 138 N.W.2d at 908. This argument is even stronger when applied to the common law tortious interference claim. *Id.* Nor is there any problem with uniformity, another interest protected by the primary jurisdiction doctrine. This is not a determination of what reasonable service was due plaintiff, but whether reasonable service, as determined by the ICC, was provided. The Iowa district court is in as good a position to adequatedly decide this as the ICC.

VI.

Our decision in this case to reverse the trial court's decision and remand for a new trial makes it unnecessary to reach plaintiff's other issue concerning whether an unlawful abandonment occurred.

REVERSED AND REMANDED.

IN THE

DISTRICT COURT OF THE STATE OF IOWA

IN AND FOR WEBSTER COUNTY

Law No. 45664

KALO BRICK & TILE COMPANY,

Plaintiff,

vs.

CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY, and JACK CHEMLER,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, and JUDGMENT

BE IT REMEMBERED that on the 19th day of October, 1976, the within cause came on for trial to the Court, the parties appearing by their attorneys of record. Said trial concluded on the 26th day of October, 1976, and the within matter was submitted to the Court on or about the 23rd day of February, 1977. The Court having heard the proofs of the parties, having read and considered the briefs and arguments of counsel, and being fully advised in the premises, FINDS the facts as follows:

FINDINGS OF FACT

Plaintiff Kalo Brick & Tile Company, hereafter "Kalo," is an Iowa corporation with its principal place of business at Fort Dodge, Webster County, Iowa.

Defendant Chicago & North Western Transportation Company, hereafter "Railroad," is a common carrier by railroad engaged in the interstate transportation of freight for hire and at all times material herein operated a railroad in Webster County, Iowa.

Defendant Jack Chmeler, mistakenly named "Scemeler," was employed by the Defendant railroad as a freight agent in Fort Dodge, Iowa, from July 17, 1972 through December 15, 1974. Mr. Chmeler was a resident of the State of Iowa.

Prior to April, 1973, Plaintiff was engaged in the manufacture of clay products near Kalo, Webster County, Iowa. Plaintiff's raw materials and manufacturing facilities were located near the Des Moines River and near a track owned and operated by the Defendant Railroad.

Plaintiff had been in operation for in excess of fifty years and in April, 1973, manufactured simulated antique brick which was sold and distributed through nine midwestern states. Plaintiff had relied upon the Defendant Railroad, and its predecessors in interest, as its primary and principal source of transportation for the transportation of its products in interstate commerce; Kalo having relied upon truck transportation for intrastate transportation.

Defendant Railroad commenced servicing Kalo in approximately the fall of 1960 when Defendant Railroad acquired the assets of the Minneapolis & St. Louis Railroad, shown in orange on Exhibit "A" attached hereto and made a part hereof for illustrative purposes only. This portion of the old Minneapolis & St. Louis Railroad extended from Fort Dodge, Iowa to Kalo, Iowa for a distance of approximately 5.6 miles. Said line terminated at Plaintiff's plant in Kalo, Iowa. The Minneapolis & St. Louis Railroad was constructed on the side hills of the Des Moines River. As this line left Fort Dodge in a southerly direction it generally followed the northeast bank of the Des Moines River, intersected the Fort

Dodge, Des Moines & Southern Railway at the Shady Oak transfer, bridged the Des Moines River, and followed the west bank of said river in a southerly direction at Kalo.

The Fort Dodge, Des Moines & Southern Railway, shown in green on Exhibit "A", travels in a southerly direction from the City of Fort Dodge and was constructed on a side hill of Gypsum Creek as it approached the Des Moines River and the tracks of the Defendant Railroad.

The general area may be described as rugged terrain, but the hills in the area are not high. Quarries and clay pits are located on the high ground between the aforesaid railroads and north of the Des Moines River. Materials have been removed from these quarries and clay pits for many years which result in ponded water. In addition, waste materials from the mined areas constituted an overburden in this same area. The soil contains clay which is hard and stable when dry but moves and becomes unstable when moist.

In 1961 earth slides occurred to the north and west of the Shady Oak Transfer which damaged the tracks of the Defendant Railroad in several areas and this portion of the tracks had to be taken out of service. Repairs were effected and service reinstated over these tracks.

In the spring of 1966 slides again occurred in this same area and service over these tracks was terminated for approximately six to seven months for repairs to be completed. Repairs were effected and the line again placed back in service.

In March, 1967, slides again occurred in the same general area and the repairs effected in 1966 failed to hold and the railroad embankment disappeared in places into the Des Moines River. Service over this line was never again reinstated.

In 1967 the Defendant Railroad leased at least a portion of the Fort Dodge, Des Moines & Southern Railway

and service was made to Kalo over the leased track to the Shady Oak Transfer and then on track belonging to the Defendant Railroad to Kalo. Defendant Railroad had an obligation to maintain the track of the Fort Dodge, Des Moines & Southern Railway north of the Shady Oak Transfer.

In March, 1973, officers of Kalo observed ponded water to the west of the Shady Oak Transfer, and near the red "X" on Exhibit "A", and adjacent to the railroad embankment leased by the Defendant Railroad. Kalo attempted to pump water over the roadbed in an attempt to clear the culvert draining the damned up body of water. Officers of Kalo had found the outfall end of said culvert and were looking for the intake. They were unsuccessful and abandoned the project.

During the first few days of April, 1973, slides occurred on the line leased from the Fort Dodge, Des Moines & Southern Railway and north of the intersection of said railway with the tracks of the Defendant Railroad.

The slide at the Shady Oak Transfer, shown generally by the red "X" on Exhibit "A", occurred over a 150 foot area of the leased embankment. A slide also occurred north of this area which affected approximately 60 feet of track. Other sides were developing along this portion of the Fort Dodge, Des Moines & Southern Railway.

On the 4th day of April, 1973, Defendant Railroad notified Kalo that it could no longer provide cars at the Kalo plant and service to the Kalo plant was terminated at that time.

Defendant Railroad then provided cars to Kalo at Fort Dodge which required Kalo to transport its product to Fort Dodge by truck for delivery to Defendant Railroad. Kalo was required to bear the cost of said transportation to Fort Dodge.

On the 18th day of April, 1973, Kalo notified its customers that it was going out of business but would complete existing contracts.

Between the 4th day of April, 1973, and the 25th day of April, 1973, a decision was made that the Defendant Railroad could not maintain safe rail passage over the tracks leased from the Fort Dodge, Des Moines & Southern Railway and it was taken out of service by the roadmaster. Defendant Railroad concluded that it could not stabilize the alignment of the tracks but no decision was made at that time as to whether Defendant Railroad would attempt to abandon service to Kalo.

In August, 1973, Kalo stopped production, sold its inventory, and disposed of its assets.

The washout at the northern junction of the Shady Oak Transfer was comparatively simple for the Defendant Railroad to repair. The reason this line was removed from service was because of the slides which were taking place along many points of the line and the above washout of the railroad embankment was a single factor in the decision to terminate service over the line. There has been a long history of slides on the Fort Dodge, Des Moines & Southern Railway because of the composition of the soil. The slopes are unstable and several of the slopes are moving. The tracks are built on an unstable area.

The tracks near the Shady Oak switch, after April 4, 1973, were out of place horizontally and vertically and showed results of failure of the railroad embankment. The ponded water near the embankment had been there sometime and was a factor in the displacement of the roadbed because (1) it weakened the soil because of saturation; (2) it created hydrostatic pressure; (3) forces induced by seepage water passed through the embankment; and (4) the embankment was on a steep slope descending to Gypsum Creek and gravity pulled the embankment toward the creek.

Permitting ponded water to stand near a railroad embankment is not good maintenance practice.

After the slides on or about the 4th day of April, 1973, no cars were received at the Kalo plant and all of Plaintiff's products had to be loaded at Fort Dodge.

On the 14th day of November, 1973, Defendant Railroad made an application to the Interstate Commerce Commission pursuant to the provisions of the Interstate Commerce Act, 49 U.S.C.A., Section 1, Et. seq., for a certificate of public convenience and necessity authorizing the Defendant Railroad to abandon its line to Kalo. This proceeding pertained to the trackage belonging to the Defendant Railroad, formerly owned by the Minneapolis & St. Louis Railroad, and not the line owned by the Fort Dodge, Des Moines & Southern Railway and leased by the Defendant Railroad.

Kalo filed objections to the abandonment of the 5.6 miles of track in said proceeding. On the 30th day of April, 1976, the Interstate Commerce Commission Review Board Number 5 made a finding of fact "that the cessation of service occurred because of conditions over which applicant (Defendant Railroad) had no control, not because of wilful abandonment"; that continued operation of the line would be an unnecessary burden on said applicant and on interstate commerce; and said commission issued an order for appropriate certificate of abandonment. Upon Kalo's petition for reconsideration of said order, the Interstate Commerce Commission, Division 3, acting as an Appellate Division denied Kalo's petition for reconsideration on the 23rd day of September, 1976, and affirmed the order of the Commission Review Board Number 5.

During the winter of 1972-1973, Kalo experienced the energy crunch and was forced to curtail its operations during the winter months, which are a slack period in the brick industry. The brick industry, including Kalo, experiences labor problems because it is hard work and low paying.

During this same period of time, Defendant Railroad was also experiencing labor problems as it was short of help and could not train the employees fast enough.

CONCLUSIONS OF LAW

On the 13th day of September, 1974, Plaintiff filed its petition herein alleging generally that the Defendants failed to furnish cars and service to Plaintiff after April, 1973, with resulting damages to Plaintiff in the amount of $350,000.00.

On the 28th day of April, 1976, Plaintiff filed its Amendment to Petition herein, Division II thereof alleging negligence on the part of the Defendants in April, 1973, with resulting damages of $350,000.00 and punitive damages of $150,000.00.

Division III of said amendment alleges that the Defendants are guilty of tortious interference with contract rights because of Defendants conduct in April, 1973, with resulting damages to Plaintiff in the sum of $100,000.00.

STATUTE OF LIMITATIONS

The answers of the Defendants, as amended, allege that Divisions II and III of the petition, as amended, are barred by the limitations of actions in that the causes of action alleged therein were not commenced within two years of the accrual thereof, to-wit: April, 1973.

Section 614.1, The Code, provides in part as follows:

> "Actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:
>
> 1. . . .
>
> 2. Injuries to person or reputation—relative rights—statute penalty. Those founded on injuries to the person or reputation, including injuries to rel-

ative rights, whether based on contract or tort, or for a statute penalty, within two years.

3. . . .

4. Unwritten contracts—injuries to property—fraud—other actions. Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years, except as provided by subsection 8. . . ."

Division II, founded on negligence, and Division III, founded on tortious interference with contract rights, allege that Plaintiff was forced to close its business because of the negligence and tortious interference with contract rights, respectively. Divisions II and III constitute allegations of injuries to property and are fundamentally proprietary in nature. Consequently, the five year statute of limitation of Section 614.1(4) is applicable rather than subparagraph two of said section (CLARK V. FIGGE (Iowa, 1970) 181 N.W. 2d 211, 58 A.L.R. 3d 1019).

The Court CONCLUDES that Divisions II and III were brought within the prescribed period of time.

CAR SERVICE

Plaintiff has characterized its case as a car service case, alleging that the Defendants failed to perform their common law and statutory duty to furnish Plaintiff with suitable cars. Defendant has challenged this characterization and contends that this case involves issues of an abandonment of a railroad line, which is exclusively within the domain of the Interstate Commerce Commission (hereafter I.C.C.), which has approved the abandonment. Defendant also contend that if this is a car service case, questions as to car service are also questions of the I.C.C. and not within the jurisdiction of a state court. Further,

Defendants contend that if there is a state court question, Defendants have fulfilled their obligations under Iowa law.

A railroad's common law duty to furnish cars to its customers has been superseded by statute both in Iowa (SEC. 479.3, 1975 Code of Iowa; SEC. 327D.3, 1977 Code of Iowa) and under federal law, The Interstate Commerce Act, as amended (49 U.S.C. Sec. 1(11)). The carrier is under an obligation to provide cars which are sufficient in number, type and condition to fulfill a shipper's needs unless it has a valid excuse (PENNSYLVANIA R.R. V. PURITAN COAL MINING CO. (1914) 237 U.S. 121, 35 S. Ct. 484, 59 L. Ed. 867; CHICAGO, R.I. & P. R.R. V. LINWOOD STONE PRODUCTS CO. (1965) 258 Iowa 1378, 138 N.W. 2d 902).

Defendant contends that the area of car service has been preempted by the Interstate Commerce Act and that a car service case must be brought before the I.C.C. rather than the courts. Plaintiff contends that the courts do have jurisdiction of car service cases in spite of 49 U.S.C.A. Sec. 1(11).

The correct rule as to the primary jurisdiction of the I.C.C. appears to be that under the Interstate Commerce Act, as amended, there has been a partial preemption of the car service area by the I.C.C. Thus, if the allegation against the railroad is that it has discriminated against a shipper by failing to furnish him cars in accord with established rules and practices of the railroad, the question of whether such rules or practices have in fact been followed is one which a court may determine. However, if the allegation is that the rule or practice itself is unreasonable and discriminates against the shipper, the question of the reasonableness of the rule or the practice thereof is for the I.C.C. to determine (BALTIMORE & OHIO R.R. V. BRADY (1933) 288 U.S. 448, 53 S. Ct. 441, 77 L. Ed. 888; MIDLAND VALLEY COAL CO. V. BARKLEY (1927) 276 U.S. 482, 48 S. Ct. 342, 72 L. Ed. 664; PENNSYLVANIA R.R. V. PURITAN

COAL MINING CO., Supra; ANDERSON V. CHICAGO, M. & ST. P. R.R. (Mich., 1919) 175 N.W. 246).

The failure of Defendant Railroad to continue service to Plaintiff's plant site does not of itself constitute a failure to provide car service. A shipper does not have an absolute right to service at his plant site. Although a shipper may in fact have such a right in a particular case, the right does not exist at common law and must arise by contract, statute, or custom (GREAT LAKES STEEL CORP. V. DETROIT, T. & I. R.R. (Mich, 1947) 26 N.W. 2d 704; Mc DONALD V. CHICAGO & N.W. R.R. (Wis., 1936) 266 N.W. 246; RICHEY AND GILBERT CO. V. NORTHERN PAC. R.R. (Minn., 1910) 125 N.W. 897).

The fact that Plaintiff's cost of shipping under the practice of shipping from the Fort Dodge facility was so high that it was forced out of business would go to the reasonableness of the practice, a question for the I.C.C. (MIDLAND VALLEY COAL CO. V. BARKLEY, Supra; TAYLOR COUNTY SAND & GRAVEL CO. V. SEABOARD C. L. R.R. (5th Cir. 1971) 446 F. 2d 853; ELGIN COAL CO. V. LOUISVILLE & N. R.R. (6th Cir. 1969) 411 F. 2d 1043; I.C.C. V. BALTIMORE & A. R.R. (D.C. Md. 1975) 398 F. Supp. 454).

The Court CONCLUDES that this is not a car service case, but to the extent that car service issues are raised, it involves issues which are within the jurisdiction of the I.C.C. rather than a court.

DUTY TO PROVIDE TRANSPORTATION

Closely related to a railroad's obligation to provide car service is its general obligation to transport all goods tendered to it. This duty to provide transportation, facilities and service is another common law obligation which has been made statutory (SEC. 479.3, 1975 Code of Iowa; SEC. 327 D.3, 1977 Code of Iowa).

At common law and under state statutes, there is a cause of action for failure to provide transportation service, whether by failure to provide car service or otherwise (PENNSYLVANIA R.R. V. PURITAN COAL CO., Supra; MINNEAPOLIS & ST. L. RY. V. PACIFIC, GAMBLE, ROBINSON CO. (8th Cir. 1954) 215 F. 2d 26; CHICAGO, R.I. & P. R.R. V. LINWOOD STONE PRODUCTS CO., Supra; BAIRD BROS. V. MINNEAPOLIS & ST. L. RY. (1916) 181 Iowa 1104, 165 N.W. 840; CARR V. CHICAGO, R.I. & P. R.R. (1916) 173 Iowa 444, 155 N.W. 840; ANDERSON V. CHICAGO, M. & ST. P. RR., Supra).

Kalo alleges that there was a general failure to provide transportation service and alleges that the railroad negligently allowed its track to become unuseable. Kalo contends that the result of the railroad's negligence in failing to keep up its track resulted in a failure to provide transportation service and cites the case of Johnson v. Chicago, M. St. P. & P. R.R. (9th Cir. 1968) 400 F. 2d 968 in support of the proposition that a railroad is liable in damages for a failure to maintain its track if such results in a failure to provide service to a shipper.

The *Johnson* case is distinguishable from the instant case in that the *Johnson* case did not involve an abandonment, as there was no intention on the part of the railroad to permanently discontinue service. Where an abandonment is involved, the rights of the parties are significantly different.

ABANDONMENT

A certificate of public convenience and necessity from the I.C.C. is required before a line may be abandoned (49 U.S.C.A. Sec. 1a(1) (1977), 49 U.S.C.A. Sec. 1(18) (1975) (Amended, Pub. L. 94-210, Tit. VIII, Secs. 802, 809(c), 90 Stat. 127, 146 (Feb. 5, 1976); Pub. L. 94-555, Tit. II, Sec. 218, 90 Stat. 2628 (Oct. 19, 1976). Failure to keep a railroad line in repair, with the result that it becomes unuseable, coupled with the cessation of service

on the line without the I.C.C. permission, constitutes an illegal abandonment of a line (I.C.C. V. MAINE C. R.R. (2nd Cir. 1974) 505 F. 2d 590; I.C.C. V. CHICAGO, R.I. & P. R.R. (8th Cir. 1974) 501 F. 2d 908, Cert. Den. 420 U.S. 972, 95 S. Ct. 1393, 43 L. Ed. 2d 652; I.C.C. V. CHICAGO & N.W. TRANSPORTATION CO. (D.C. Ia. 1975) 407 F. Supp. 827; I.C.C. V. BALTIMORE & A. R.R., Supra).

Generally, the remedies for an illegal abandonment are solely in federal court. A party may have a state court remedy if a state statute provides one or if the party has a contract with the railroad obligating the railroad to keep the track in service (MONTGOMERY V. ATCHISON, T. & S.F. R.R. (10th Cir. 1937) 89 F. 2d 94; But see MOELLER V. I.C.C. (D.C. Ia. 1962) 201 F. Supp. 583).

There are no Iowa statutes providing a remedy for an illegal abandonment.

Absent statutory authority, however, there is no common law right to prevent abandonment of a railroad line, or to sue for damages as a result thereof (SCULLY V. CENTRAL NEBRASKA PUBLIC POWER & IRRIGATION DISTRICT (Neb. 1943) 9 N.W. 2d 207, 215; WOODRUFF V. U.S. (D.C. D.C. 1941) 40 F. Supp. 949; BROWNWOOD N. & S. RY. V. RAILROAD COMMISSION OF TEXAS (D.C. Tex. 1926) 16 F. 2d 297, 298).

The remedies under federal law are:

(1) The right to enjoin the abandonment. Until 1976, this could be done by "any court of competent jurisdiction," (49 U.S.C.A. Sec. (20) (1975)), which would apparently include state courts. After 1976, the injunctive remedy is solely in a federal court (49 U.S.C.A. Sec. 1a (9) (1977)); and

(2) Damages to the shipper for the period of time from the date of the unlawful abandonment until the abandonment is approved by the I.C.C. (49 U.S.C.A. Secs.

8, 9 (1977); I.C.C. V. CHICAGO, R.I. & P. R.R., Supra; JOHNSON V. CHICAGO, M. ST. P. & P. R.R., Supra; But see ASBURY V. CHESAPEAKE & O. R.R. (D.C. D.C. 1970) 314 F. Supp. 310).

In pursuing the damages remedy, a shipper may proceed either before the I.C.C. or before a federal court, but not both, and not in a state court (49 U.S.C.A. Secs. 8, 9).

In determining whether the railroad has fulfilled its obligation to provide adequate facilities, the test is one of reasonable diligence; and its business as a whole, the character of the service required, the need of its performance, and the various rights of the public and of the carrier should in this respect be considered (MIDLAND VALLEY COAL CO. V. BARKLEY, Supra; STATE OF NEBRASKA V. UNITED STATES (D.C. Neb. 1966) 255 F. Supp. 718).

The abandonment proceedings involved herein concerned the trackage owned by the Defendant Railroad (that shown in orange on Exhibit "A") the northern portion of which had not been in service since 1967. The trackage leased from the Fort Dodge, Des Moines & Southern Railway (shown in green on Exhibit "A") was not involved directly in said abandonment proceedings.

This controversy involved questions which demand the exercise of administrative discretion requiring the special knowledge, experience, and services of the I.C.C. to determine technical and intricate matters of fact, and a uniformity of ruling is essential to comply with the purposes of the Interstate Commerce Act, as amended.

The Court CONCLUDES that although a carrier has an absolute duty to provide transportation service, in providing the service the carrier is not required to do any more than what is reasonable. The questions raised in an abandonment proceeding all involve a reasonableness standard—what the public convenience and necessity require ((49 U.S.C.A. Sec. 1a(4); I.C.C. V. MAINE

C. R.R., Supra; MIDLAND VALLEY COAL CO. V. BARKLEY, Supra). The public's general right to rail transportation is therefore qualified by a railroad's right, with permission, to abandon a particular line. When an abandonment has occurred, the question is not whether there has been a failure to provide transportation service, but whether such failure was justified. The rights of the parties in such a case must be governed by the rules relating to abandonments rather than the rules on the general duty of providing transportation service.

In this case, since an abandonment was involved, Kalo's remedy lay in the federal court and it has no cause of action in this court.

RES JUDICATA/PRECLUSION

Both Kalo and the Defendants raise issues of issue preclusion.

The philosophical basis for the doctrine of collateral estoppel is that a party should have a full and fair day in court to be heard on the issue. On the other hand, the basis on which the doctrine of issue preclusion rests is that the parties ought not to be permitted to litigate the same issue more than once (GOOLSBY V. DERBY (Iowa, 1971) 189 N.W. 2d 909, 915).

To bar further litigation on a specific issue four requirements must be established:

(1) Issue concluded must be identical.

(2) Issue must have been raised and litigated in the prior action.

(3) The issue must have been material and relevant to the disposition of the prior action, and

(4) The determination made of the issue in the prior action must have been necessary and essential to the resulting damage (SCHNEBERGER V. UNITED STATES FIDELITY & GUAR. CO. (Iowa, 1973) 213 N.W. 2d 913, 917).

Plaintiff brought suit against the Defendant Railroad, a Delaware corporation with its principal place of business in Illinois, and Jack Chmeler, a resident of Iowa. The within cause was removed to the United States District Court, Northern District of Iowa, Central Division and Defendant Railroad contended that Defendant Chmeler was fraudulently joined solely for the purpose of defeating removal jurisdiction.

Thereafter Kalo filed its motion to remand and Defendant Railroad filed its motion to dismiss in that said United States District Court lacked jurisdiction over the subject matter in that Kalo's sole remedy was injunctive relief pursuant to 49 U.S.C.A. Sec. 1(20) when it was alleged there was an illegal abandonment under 49 U.S.C.A. Sec. 1(18).

Plaintiff contends that the order of the Honorable William C. Hanson, Judge, United States District Court, Northern District of Iowa, constituted a finding and adjudication that the state court had jurisdiction of the subject matter and Defendants are precluded from raising the issue again.

Said order concludes as follows:

> "The Court has carefully studied the plaintiff's petition and in particular Paragraphs 2 and 5 thereof. While the allegations therein contained are rather broad, the Court without introduction of evidence cannot discern whether Jack Chmeler's alleged acts border on active negligence or mere nonfeasance. Thus, the Court must conclude that "there is a possibility that the plaintiff has stated a cause of action," and that the joinder of Jack Chmeler was not fraudulent.
>
> Accordingly, IT IS ORDERED that the plaintiff's Motion to Remand be, and the same is, hereby sustained for want of subject matter jurisdiction.
>
> IT IS FURTHER ORDERED that this cause of action be remanded to the District Court of the State of Iowa, in and for Webster County."

Notwithstanding language contained in said order, said order was a ruling upon Kalo's Motion to Remand only. Said order specifically recites that the basis of the order was upon the allegations contained within Kalo's petition without the introduction of evidence and was bottomed on the conclusion that there was a "possibility that the plaintiff has stated a cause of action" against Jack Chmeler and therefore not fraudulent. The basis of said order was that with the inclusion of Jack Chmeler, a citizen of Iowa, as a defendant, the diversity of citizenship requirement of 28 U.S.C.A. Sec. 1332 was defeated and the subject matter jurisdiction of said court was therefore defeated.

The Court CONCLUDES that there is not an issue of identical nature in the instant case.

The Defendants contend that factual issues that are determinative of the present lawsuit have already been decided by a valid and final judgment of the Interstate Commerce Commission in the Kalo Line Abandonment Proceedings, in which both the Defendant Railroad and Kalo were parties.

On the 16th day of November, 1973, the Defendant Railroad filed with the I.C.C. an application seeking a certificate of public convenience and necessity permitting abandonment of the Kalo line (the line marked in orange on the attached Exhibit "A").

Notice of the proposed abandonment was served on Kalo on the 19th day of November, 1973. On or about the 18th day of September, 1975, the I.C.C. gave notice to Kalo as to the procedure to be followed in this particular proceeding and Kalo became a party in said proceedings protesting said abandonment.

On the 19th day of May, 1976, after hearing on April 30, 1976, the Interstate Commerce Commission, Review Board Number 5 found that Kalo, the protestant therein, was in default; that service on the Kalo line had been disrupted several times in the past by landslides; that

in 1967 a landslide occurred on the line which caused the Defendant Railroad to continue service to Kalo through the lease of tracks from another carrier; that, in 1973, a landslide caused the termination of service over the leased tracks; that, due to the soil condition and mining activities in the area, repairs of the leased track would not be sufficient to insure continuous operation on the line; that the cessation of service occurred because of conditions over which Defendant Railroad had no control, not because of wilful abandonment; and, that under the circumstances, continued operation of the line would be an unnecessary burden on Defendant Railroad and on interstate commerce.

Thereafter Kalo filed its petition for reconsideration of said I.C.C. order which contained a service date of May 19, 1976.

On the 30th day of September, 1976, the Interstate Commerce Commission, Division 3, acting as an Appellate Division, found that the order of the Commission, Review Board Number 5 was not erroneous; that the petition for reconsideration of Kalo set forth no material facts or arguments in addition to those previously considered in the proceedings; denied Kalo's petition for reconsideration; and, affirmed the previous order of May 19, 1976.

In order for Kalo to be successful against the Defendant Railroad in this court, there must be proof by a preponderance of the evidence that Defendant Railroad failed to provide cars or transportation to Kalo or that Defendant Railroad was negligent in the maintenance of its line, as opposed to failure to provide cars and transportation because of lawful abandonment.

The I.C.C. made a final determination of fact that this is an abandonment case.

The I.C.C. further made a final determination of fact "that the cessation of service occurred because of conditions over which applicant (Defendant Railroad) had no control, not because of wilful abandonment," and, that,

"due to the soil condition and mining activities in the area, the repairs would not be sufficient to insure continuous operations on the line."

In abandonment proceedings before the I.C.C. the question of whether the deterioration of a line is due to a railroad's negligence or due to conditions beyond its control is always a concern in abandonment proceedings (MISSOURI-KANSAS-TEXAS RAILROAD COMPANY ABANDONMENT BETWEEN ALTOS AND FORGAN, OKLAHOMA 338 I.C.C. 728, 743-748 (1971)).

It was upon a finding that Defendant Railroad had done nothing illegal or negligent that the final determination of the I.C.C. was reached.

The rule of res judicata/preclusion applies to judicial and quasi-judicial acts of public officers and boards as to the judgments of courts having general judicial powers (RILEY V. BD. OF TRUSTEES OF POLICEMEN'S PENSION FUND (1930) 210 Iowa 449, 455, 228 N.W. 578, 851; BANKERS LIFE CO. V. CITY OF EMMETSBURG (1938) 224 Iowa 1287, 278 N.W. 311; TIDEWATER OIL COMPANY V. JACKSON (10th Cir. 1963) 320 F. 2d 157, 161; LANDRETH V. WABASH R. CO. (7th Cir. 1948) 153 F. 2d 98, 100).

Where a federal agency has, within the scope of its authority, made a formal administrative determination of a factual issue, a party that had an opportunity to litigate the issue before the federal agency may take advantage of statutory provisions or appeal of the agency's decision, but the party may not relitigate the issue by commencing an action in a court of original jurisdiction (SIBA CORP. V. WEINBERGER (1973) 412 U.S. 640, 644, 93 S. Ct. 2495, 37 L. Ed. 2d 230, 234). This doctrine is applicable to judgments rendered by the I.C.C. (SEATRAIN LINES, INC. V. PENNSYLVANIA R. CO. (3rd Cir. 1953) 207 F. 2d 255, 259).

The present parties took opposite sides in the proceeding in the I.C.C.; said proceedings were in the I.C.C.

which has specialized knowledge and experience in this area; Kalo's claim was sizeable which reasonably should have been known on or about the 14th day of November, 1973, the date Defendant Railroad made its application to the I.C.C., and, certainly known as of the 13th day of September, 1974, the date the petition was filed herein; and, future litigation was reasonably foreseeable at or about the time that the Defendant Railroad filed its application to abandon the line in November, 1973.

The Court CONCLUDES that the matters now raised by the petition, as amended, have been determined adversely to Kalo by the I.C.C. and that, because of the determination by the I.C.C., Kalo is collaterally estopped from again litigating them.

AGENT/EMPLOYEE

Plaintiff's petition alleges that the Defendant Jack Chmeler is and was an agent for the Defendant Railroad and has been in charge of the operation of said railroad at all times material herein. Plaintiff further alleges that Jack Chmeler operated as a railroad common carrier in Webster County, Iowa, and prior to April, 1973, provided railroad service to the Kalo plant. Further that Defendant Chmeler after April, 1973, refused to give service to Kalo or furnish cars after repeated requests to him. As a consequence thereof Kalo prays for a judgment against him for $350,000.00 and costs.

The undisputed evidence is that Defendant Chmeler was the freight agent in Fort Dodge, Iowa, from July 17, 1972-December 15, 1974, and as such either he or his subordinates received car orders. His immediate superior is the trainmaster which is a separate department head as distinguished from the roadmaster. The evidence shows that the Kalo line was taken out of service by the roadmaster because of inability to stabilize the alignment of tracks.

There is a complete failure of proof to show that Defendant Chmeler at any time acted as a railroad common

carrier. There is also a failure of proof to show that Defendant Chmeler personally, refused to give service to Kalo or furnish cars to Kalo.

The Court CONCLUDES that there has been a failure of proof to show that Defendant Chmeler had a duty to provide car service or transportation to Kalo as a common carrier by railroad in either intrastate or interstate transportation of freight for hire.

In Divisions II and III Kalo alleges again that Defendant Chmeler operated as a railroad common carrier in Webster County, Iowa, and operated a line to the Kalo plant; that Kalo shipped its products over Defendant Chmeler's line; that Defendant Chmeler failed to maintain the tracks in a proper manner and neglected and refused to deliver cars on order; that he delivered cars to Kalo which were unsuitable for use by reason of being dirty, broken and unworthy; that he failed and neglected to properly maintain the railroad right-of-way; and, as a result of the negligence of the Defendant Chmeler Kalo suffered damages in the amount of $350,000.00 and punitive damages in the amount of $150,000.00. Further, as a result of the Defendant Chmeler's acts of interference with Kalo's contracts, Kalo was damaged in the amount of $100,000.00.

An agent is not responsible to a third person for injury resulting from mere nonfeasance, meaning the omission of the agent to perform a duty owed solely to its principal by reason of his agency (CRAMBLITT V. PERCIVAL-PORTER CO. (1916) 176 Iowa 733, 742-743, 158 N.W. 541, 545; KNIGHT V. ATLANTIC COAST LINE (5th Cir. 1934) 73 F. 2d 76; TOADVINE V. CINCINNATI, N. O. & T. P. RY. (D.C. Ky. 1937) 20 F. Supp. 226; DAVIS V. ST. LOUIS & S. F. RY. CO. (N.D. Okl. 1934) 8 F. Supp. 519).

"An agent, while obeying the command or performing the service of the principal, is not justified in committing a tort; and if he does, not only the principal, but the agent, may be made to answer in damages therefor. But

where a duty rests on the principal, and not on the agent, its nonperformance by the latter creates no liability as against him, if injury results. True, he may owe a duty to the principal to faithfully discharge his duties as agent; but he owes no duty to others, except that, in the performance of those duties, he shall not do anything which will cause injury to them. If the agent fails to perform a duty which he owes to the principal, and, by reason of such nonperformance or neglect of duty, a third person sustains injury, no action can be maintained against the agent by such third party person on account thereof" (CRAMBLITT V. PERCIVAL-PORTER CO., Supra, 176 Iowa at 744-745, 158 N.W. at 545).

The evidence does not show that Chmeler had any duty with respect to Kalo except such as was imposed by his contract of employment as freight agent for Defendant Railroad. The evidence fails to show facts giving rise to a duty of Chmeler to Kalo with reference to providing car service, maintenance of the roadbed, or providing transportation.

The Court CONCLUDES that Kalo has failed to prove a cause of action against the Defendant Chmeler.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, as follows:

(1) That the Defendants, the Chicago and North Western Transportation Company and Jack Chmeler a/k/a Jack Scemeler, have judgment against the Plaintiff, Kalo Brick & Tile Company, dismissing its petition herein.

(2) That the Defendants, The Chicago and North Western Transportation Company and Jack Chmeler, a/k/a Jack Scemeler, have judgment against the Plaintiff, Kalo Brick & Tile Company, dismissing Division II of its petition, as amended, herein.

(3) That the Defendants, The Chicago and North Western Transportation Company and Jack Chmeler,

a/k/a Jack Scemeler, have judgment against the Plaintiff, Kalo Brick & Tile Company, dismissing Division III of its petition, as amended, herein.

(4) That said Defendants have judgment against said Plaintiff for the costs of this action taxed by the Clerk in the sum of $ .....

By The Court
Russell J. Hill, Judge

Copies To:
Mitchell, Murray, Blackburn & Coleman, P.C.
Gamble, Riepe, Burt, Webster & Fletcher

TESTIMONY OF JERRY SCHNURR, CORPORATE OFFICER OF KALO, FROM TRANSCRIPT PAGE 321, LINE 17, TO PAGE 322, LINE 2:

Q. In other words, some of your shipping would have been local? A. Correct.
Q. And that wouldn't—you wouldn't have intended to ship that by rail anyway? A. No, sir.
Q. Basically, you shipped long haul rail and short haul truck? A. Basically we shipped the majority of our products by rail. The product that went to our distributor, the local (Tr. p. 322) product and the product within the State of Iowa, I could say would have been shipped by truck.

INTERSTATE COMMERCE COMMISSION

Washington, D.C. 20423

I, ROBERT L. OSWALD, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of the Order of the Commission, entered April 30, 1976, in Docket No. AB-1 (Sub No. 24), Chicago & North Western Transportation Company—Abandonment Between Fort Dodge and Kalo, in

Webster County, Iowa, the original of which is now in file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 8th day of October, A.D., 1976.

/s/ Robert L. Oswald

SECRETARY OF THE
INTERSTATE COMMERCE
COMMISSION

ORDER

SERVICE DAY — May 19, 1976

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 5, held at its office in Washington D.C., on the 30th day of April, 1976.

AB-1 (Sub-No. 24)

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT BETWEEN FORT DODGE AND KALO, IN WEBSTER COUNTY, IOWA

It appearing, That by application filed November 16, 1973, Chicago & North Western Transportation Company, pursuant to sections 1(18-20) of the Interstate Commerce Act, seeks a certificate of public convenience and necessity permitting abandonment of the line of railroad beginning at mile post 222.0 at Fort Dodge and extending in a south-easterly direction to milepost 227.6 at Kalo, a distance of approximately 5.6 miles, all in Webster County, Iowa;

It further appearing, That by order of September 12, 1975, the proceeding was set for handling under the modified procedure; that applicant timely filed a verified statement; that United States Gypsum Company, which was permitted to intervene by order of September 3, 1975, filed a statement in support of the application, but protestant, Kalo Brick & Tile Company did not file a veri-

fied statement in opposition as required; and that, pursuant to section 1100.46(b) of the Commission's General Rules of Practice, protestant is deemed to be in default and entitled to no further formal proceedings;

It further appearing, That by order of September 12, 1975, the proceeding was set for handling under the modified procedure; that applicant timely filed a verified statement; that United States Gypsum Company, which was permitted to intervene by order of September 3, 1975, filed a statement in support of the application, but protestant, Kalo Brick & Tile Company did not file a verified statement in opposition as required; and that, pursuant to section 1100.46(b) of the Commission's General Rules of Practice, protestant is deemed to be in default and entitled to no further formal proceedings;

It further appearing, That service on the line has been disrupted several times in the past by landslides, but applicant made necessary repairs to enable continuation of service; that, in 1967, a landslide occurred which could have been repaired, but, due to the soil condition, said repairs would have been only of a temporary nature; that service to shippers was continued through the lease of tracks from another carrier; that, in 1973, a landslide caused the cessation of operations over this leased track; that the cost of rehabilitation of the applicant's line is estimated to be in excess of $150,000; that the cost of rehabilitation of the leased track is estimated to be in excess of 100,000; that, due to the soil condition and mining activities in the area, the repairs would not be sufficient to insure continuous operations on the line; that Kalo Brick & Tile Company was the only shipper located on the line when it was last in operation; and that the company has been closed for two years;

It further appearing, That the cessation of service occurred because of conditions over which applicant had no control, not because of willful abandonment; that it is well settled that a shipper cannot insist that a burden-

some line be maintained solely for its own use; *Moeller* v. *I.C.C.*, 201 F. Supp. 583 (S. D. Iowa, 1962); *Village of Candor* v. *U. S.*, 151 F. Supp. 889 (N. D. N Y 1957); *United States Feldspar Corporation* v. *U. S.* 38 F. 2d 91 (N. D. N Y 1930); and that, under these circumstances, continued operation of the line would be an unnecessary burden on applicant and on interstate commerce;

RECEIVED
MAY 21, 1976
LAW DEPARTMENT
C. & N. W. TRANS. CO.

It further appearing, That an environmental threshold assessment survey has been prepared by the Commission and made available for public inspection upon request; that such survey has found that no significant impact on the environment would result from the approval of the application; that by order of the Commission, Commissioner Tuggle, served June 25, 1975, it was determined that based on the aforesaid threshold assessment survey, no environmental impact statement need be issued in this proceeding as it does not represent a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331 *et seq.;* that appropriate notice of such determination has been published as directed by this Commission; that this Commission received no substantive comments as to said determination as of the date hereof; that said threshold assessment survey is a part of the record in this proceeding and has been weighed in considering the issues herein; and that, and the Board so finds, the economic advantages to be gained by applicant and the burdens to be avoided by the applicant and interstate commerce through the abandonment outweigh any adverse environmental factors; and

It further appearing, and the Board so finds, That the present and future public convenience and necessity permit abandonment by the Chicago & North Western Transportation Company of the above-described line of railroad, subject to the condition that employees shall be entitled for protection, to the conditions as set forth in *Chicago, B. & Q. R. Co. Abandonment,* 257 I.C.C. 700; and *provided, however,* that any responsible State agency and/or local government or other interested responsible organization be given the opportunity, for a period of 120 days from the date of actual abandonment to negotiate the purchase of all or any portion of the right-of-way of the line to be abandoned for public use at a purchase price on such terms as the parties may agree as just and reasonable, but not less than a purchase price ascertained in accordance with the principles controlling in condemnation proceedings;

It is ordered, That this order shall be effective 30 days from the date of service; and that upon this order becoming administratively final an appropriate notice of the finding heretofore made is to be published in the Federal Register pursuant to the requirements of section 1a(6)(a) of the Interstate Commerce Act, as amended, as provided in the Notice of the Commission entitled "Procedures for Pending Rail Abandonment Cases", served March 31, 1976, and published in the Federal Register, 41 FR 13691 (March 31, 1976), which also describes the procedures to be used in submitting offers of subsidy;

It is further ordered, That in the event any person or government entity is considering an offer of financial assistance for the continued operations or acquisition of the subject line, then such person or government entity should give notice that it is considering an offer to provide financial assistance in written form by certified mail to carrier applicant and by first class mail to all parties of record and the Commission; that within 10 days from the date of receipt of such written notification, whether such notification is received before or after the Federal Regis-

ter publication, applicant shall furnish, with a copy to this Commission, to any person considering an offer of financial assistance the following: (1) its most recent report on the physical condition of the subject line of railroad; (2) a current report on the train service on the line and a current report on traffic and revenue attributable to the subject line; (3) an actual computation of the extent to which avoidable cost of providing rail service plus a reasonable return on the value of the rail properties involved exceed the revenues attributable to the line of railroad, as determined by the "Standards for Determining Rail Service Continuation Subsidies", 49 CFR 1125, which data will be used by the Commission to assist it in making the determination required by the statute;

It is further ordered, That within 15 days of the date of publication of notice of the finding in this proceeding in the Federal Register any person, including a government entity, who may have been considering the making of an offer of financial assistance for the purpose of continuation of the rail service involved herein shall make a bona fide offer of financial assistance to carrier applicant and shall file with the Commission with an appropriate reference to this proceeding the following: (1) a bona fide offer of financial assistance; (2) information and data which demonstrates that the offeror of financial assistance is financially responsible, including, in the event the offeror is a person other than a government entity, appropriate financial data (a) consisting of a balance sheet and accompanying schedules as of a date not earlier than 6 months prior to the date of such submission, and (b) an income statement showing its revenues, expenses, and net income for the current calendar year to the latest available date and for each of the two preceding calendar years, or in the event the offeror is a government entity, a statement indicating that it has appropriate authority and necessary funds enabling it to enter into contracts affording financial assistance for rail service operations or acquisitions of rail lines, and (3) information to support a finding by the Commission that such

offer of financial assistance will likely cover the difference between the revenues attributable to the line of railroad and the avoidable costs of providing rail freight service over the line, plus a reasonable return on the value of the line; or that it is likely to cover the cost of acquiring all or a portion of the line and thereby meet the requirements of section 1a(6)(a) (ii)(A) or (B) of the Act, as amended;

It is further ordered, That if the Commission finds that a financially responsible person has offered financial assistance in accordance with the procedures outlined above, as published in the above-referenced Notice of March 31, 1976, in the Federal Register, the Commission shall postpone the issuance of a certificate of abandonment for such reasonable time, not to exceed 6 months, as is necessary to enable such person or government entity to enter into a binding agreement with the applicant railroad to provide financial assistance for continued rail service or to effect a purchase of the rail line;

It is further ordered, That when the Commission is informed of the execution of any financial assistance agreement or acquisition and operating agreement, the issuance of the certificate of abandonment shall be postponed for such period of time as such an agreement, including any extensions or modifications, is in effect;

It is further ordered, That all correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisition of the subject line shall contain an appropriate reference to the subject proceeding; and that on the lower left hand corner of envelopes containing such correspondence the following notation shall be typed in boldface "AB-RSCP";

And it is further ordered, That, subject to the conditions set forth above, an appropriate certificate of abandonment will be issued, and that the applicant shall not effect abandonment prior to the effective date of such certificate of abandonment.

By the Commission, Review Board Number 5, Members Krock, Pohost, and Taylor.

ROBERT L. OSWALD,
Secretary.

(SEAL)

INTERSTATE COMMERCE COMMISSION

Washington, D.C. 20423

I, H. GORDON HOMME, JR., Acting Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of the Order of the Commission, entered September 23, 1976, in Docket No. AB-1 (Sub No. 24), Chicago & North Western Transportation Company—Abandonment Between Fort Dodge and Kalo, in Webster County, Iowa, the original of which is now on file and of record in the office of said Commission.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 8th day of October, A.D., 1976.

/s/ H. Gordon Homme, Jr.,
ACTING SECRETARY OF THE
INTERSTATE COMMERCE
COMMISSION

SERVICE DATE— Sep. 30, 1976

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D.C., on the 23rd of September ....., 1976.

AB 1(Sub-No. 24)

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY—ABANDONMENT BETWEEN FORT DODGE AND KALO, IN WEBSTER COUNTY, IOWA

Upon consideration of the record in the above-entitled proceeding including the order of the Commission, Review Board No. 5, served May 19, 1976, authorizing the Chicago & North Western Transportation Company to abandon the line described above; the pleading of protestant Kalo Brick & Tile Company, filed June 9, 1976, which will be treated as a petition for reconsideration of the order of the Commission, Review Board No. 5, served May 19, 1976; and the replies to protestant's petition for reconsideration filed by applicant on July 2, 1976, and by intervenor, United States Gypsum Company, filed on July 19, 1976;

It appearing, That the order of the Commission, Review Board No. 5, is not shown to be erroneous on the basis of the record made by the parties complying with the order for modified procedure; that said petition sets forth no material facts or arguments in addition to those previously considered in the proceeding; and that no showing has been made warranting reconsideration of said order of the Commission, Review Board No. 5;

It is ordered, That the petition for reconsideration be, and it is hereby denied.

It is further ordered, That the order of the Commission, Review Board No. 5, served May 19, 1976, shall be effective 20 days from the date of service of the order herein.

By the Commission, Division 3, acting as an Appellate Division, Commissioners Brown, MacFarland and Corber (Commissioner MacFarland not joining in the majority statement).

/s/ H. Gordon Homme, Jr.
Acting Secretary

(SEAL)

TESTIMONY OF JERRY SCHNURR, OFFICER OF KALO BRICK AND TILE COMPANY; (transcript page 321, line 17 to page 322, line 2; addendum to appendix in the Supreme Court of Iowa, number 2-60942, page 5)

Q. In other words, some of your shipping would have been local? A. Correct.

Q. And that wouldn't — you wouldn't have intended to ship that by rail anyway? A. No, sir.

Q. Basically, you shipped long haul rail and short haul truck? A. Basically we shipped the majority of our products by rail. The products that went to our distributor, the local product and the product within the State of Iowa, I could say would have been shipped by truck.

49 U.S.C.A.

§ 1, par. (4). Duty to furnish transportation and establish through routes; division of joint rates. It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers. Feb. 4, 1887, c. 104, Pt. I, §1, 24 Stat. 379; June 29, 1906, c. 3591, § 1, 34 Stat. 584; June

18, 1910, c. 309, § 7, 36 Stat. 544; Feb. 28, 1920, c. 91, § 400, 41 Stat. 474; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 2(c), 54 Stat. 899.

Section 1, of which this paragraph is apart, is set out in toto at pp. 18-28.

§ 1, par. (10). "Car service" defined. The term "car service" in this chapter shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101, Feb. 28, 1920, c. 91, § 402, 41 Stat. 476; Aug. 9, 1935, c. 498, §1, 49 Stat. 543.

Section 1, of which this paragraph is a part, is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph was added to section 1 of the Act of 1887, by the amendatory Act of May 29, 1917, and was amended to read as above by the Transportation Act of Feb. 28, 1920, and given the number "(10)".

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 1, par. (11). Duty to furnish car service; rules and regulations. It shall be the duty of every carrier by railroad subject to this chapter to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat.

101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 476; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

Section 1, of which this paragraph is a part, is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph was added by Act May 29, 1917 and was amended to read as above by the Transportation Act of Feb. 28, 1920, and was given the number "(10)."

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 1, par. (13). Rules and regulations as to car service to be filed, etc. The Commission is authorized by general or special orders to require all carriers by railroad subject to this chapter, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this chapter relating thereto. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, §402, 41 Stat. 477; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

Section 1, of which this paragraph is a part, is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph is not found in original Interstate Commerce Act of 1887 or the earlier amendatory acts, but was added to section 1 by the Act of May 29, 1917, and was amended to read as above by the Transportation Act of Feb. 28, 1920, and given the number "(13)."

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 1, par. (14). Establishment by Commission of rules, etc., as to car service. (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

(b) It shall be unlawful for any common carrier by railroad or express company, subject to this chapter, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property transported or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party to any such contract, agreement, or arrangement unless and until such contract, agreement, or arrangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest: *Provided,* That if the Commission is unable to make its determination with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 476; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 4(a), 54 Stat. 901.

Section 1, of which this paragraph is a part, is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph is not found in the original Interstate Commerce Act of 1887 or the earlier amendatory acts, but was added to section 1, by the amendatory Act of May 29, 1917 and was amended by the Transportation Act of Feb. 28, 1920, and given the number "(14)."

1940 Amendment. Act Sept. 18, 1940, amended paragraph generally.

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 1, par. (17). Directions of Commission as to car service; disobedience; rights of States; bribery. (a) The directions of the Commission as to car service and to the matters referred to in paragraphs (15) and (16) of this section may be made through and by such agents or agencies as the Commission shall designate and appoint for that purpose. It shall be the duty of all carriers by railroad subject to this chapter, and of their officers, agents, and employees, to obey strictly and conform promptly to such orders or directions of the Commission, and in case of failure or refusal on the part of any carrier, receiver, or operating trustee to comply with any such order or direction such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States: *Provided, however,* That nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this chapter and except as otherwise provided in this chapter.

(b) It shall be unlawful for any person to offer or give or cause or procure to be offered or given, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, to any person acting for or employed by any carrier by railroad subject to this part with intent to influence his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. It shall be unlawful for any person acting for or employed by any carrier by railroad subject to this chapter to solicit, accept, or receive, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, with intent to be influenced thereby in his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. Any person who violates the provisions of this subparagraph shall be deemed guilty of a misdemeanor and be subject for each offense to a fine of not more than $1,000, or imprisonment in the penitentiary for a term of not more than two years, or both such fine and imprisonment. Feb. 4, 1887, c. 104, Pt. I. § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 477; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 4, (b), 54 Stat. 899; Aug. 12, 1958, Pub. L. 85-625, § 3, 72 Stat. 570.

Section 1, of which this paragraph is a part, is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph is not found in the original Interstate Commerce Act of 1887 or the earlier amendatory acts. The first part of this paragraph down to the proviso was added by the amendatory Act of May 29, 1917, was amended by the Transportation Act of Feb. 28, 1920, and was given the number "(17)."

1958 Amendment. Subd. (a) amended by Pub. L. 85-625 which inserted "and except as otherwise provided in this chapter" following "made under the provisions of this chapter".

1940 Amendment. Act Sept. 18, 1940, amended paragraph by designating existing provisions as subd. (a) and by adding subd. (b).

Subd. (b) added by Act Sept. 18, 1940.

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 1, par. (18). Extension or abandonment of lines; certificate required; contracts for joint use of spurs, switches, etc. No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402,

41 Stat. 477; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 4(c), 54 Stat. 901.

Section 1, of which this paragraph is a part, is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph is not found in the original Interstate Commerce Act of 1887 nor in the earlier amendatory acts. It was added by the Transportation Act of Feb. 28, 1920, and given the number "(18)."

1940 Amendment. Act Sept. 18, 1940, amended paragraph by adding last sentence.

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 1, par. (20). Issuance of certificate by Commission; unlawful extension or abandonment of lines. The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer,

receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both. Feb. 4, 1887, c. 104, Pt. I, § 1, 24 Stat. 379; May 29, 1917, c. 23, 40 Stat. 101; Feb. 28, 1920, c. 91, § 402, 41 Stat. 478.

Section 1, of which this paragraph is set out in toto at pp. 18-28.

Historical Note

Codification. This paragraph is not found in the original Interstate Commerce Act of 1887, nor in the earlier amendatory acts. It was added by the Transportation Act of Feb. 28, 1920, and given the number "(20)."

§ 8. Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. Feb. 4, 1887, c. 104, Pt. I, § 8, 24 Stat. 382; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

Historical Note

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

§ 9. Remedies of persons damaged; election; witnesses

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter in any district court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding. Feb. 4, 1887, c. 104, Pt. I, § 9, 24 Stat. 382; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543.

Historical Note

1935 Amendment. Act Aug. 9, 1935, substituted "this part" for "this Act", which has been translated to read "this chapter".

479.3 Duty to furnish cars and transport freight

Every railway corporation shall upon reasonable notice, and within a reasonable time, furnish suitable cars to any and all persons who may apply therefor, for the transportation of any and all kinds of freight, and receive and transport such freight with all reasonable dispatch, and provide and keep suitable facilities for the

receiving and handling thereof at any depot on the line of its road.

479.122 Liability for negligence of employees

Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of the agents, or by any mismanagement of the engineers, or other employees thereof, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

IN THE DISTRICT COURT OF THE STATE OF IOWA

IN AND FOR WEBSTER COUNTY

KALO BRICK & TILE COMPANY,

Plaintiff,

vs.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY, Successor in Interest in CHICAGO AND NORTHWESTERN RAILWAY COMPANY and JACK SCEMELER,

Defendants.

Law No. 45,664

SEPARATE ANSWER OF CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

Comes Now defendant Chicago and North Western Transportation Company, and, for its separate answer

to the Petition filed herein by the plaintiff, Kalo Brick & Tile Company, respectfully states:

1. This defendant does not have sufficient information to form a belief as to the allegations contained in paragraph 1 thereof and therefore denies the same.

2. For its answer to the allegations contained in paragraph 2 thereof, this defendant specifically denies that defendant Jack Chmeler (erroneously referred to herein as "Scemeler") and his predecessor agents have been in charge of the operation of the business of the Chicago and North Western Transportation Company and its predecessor at all times material hereto. This defendant admits the balance of the allegations of paragraph 2 thereof.

3. This defendant does not have sufficient information to form a belief as to the allegations contained in paragraph 3 thereof and therefore denies the same.

4. For its answer to the allegations contained in paragraph 4 thereof, this defendant specifically denies that defendant Jack Chmeler operated as a railroad common carrier in Webster County, Iowa, and in particular a line from Fort Dodge, Iowa, to Kalo, Iowa, and to plaintiff's plant. This defendant further specifically denies that, for many years, the foregoing line of track was operated by defendant Jack Chmeler and his predecessors. This defendant further specifically denies that, for many years, the plaintiff shipped its products over defendant Jack Chmeler's line. This defendant further specifically denies that plaintiff built up its business on the basis of the railroad service that was available until April of 1973. This defendant admits the balance of the allegations of paragraph 4 thereof.

5. For its answer to the allegations contained in paragraph 5 thereof, this defendant specifically denies that, prior to April of 1973, defendant Jack Chmeler gave railroad service to the plaintiff and that, after April of 1973, defendant Jack Chmeler failed and refused to

give service to the plaintiff or to furnish any railway cars or to send trains to the plaintiff's plant at Kalo, Iowa. This defendant further specifically denies that plaintiff made repeated requests for service and for cars to defendant, its agent and, in particular, its agent defendant Jack Chmeler. This defendant further specifically denies that defendant Jack Chmeler owed any common law or statutory duties as a common carrier of freight to plaintiff. This defendant further specifically denies that this defendant failed and refused to perform the common law and statutory duties of a common carrier of freight to plaintiff. This defendant further specifically denies that, as a result, plaintiff was forced to give up its business resulting in substantial damages to it. This defendant further specifically denies that defendant Jack Chmeler had any duty to operate as a common carrier. This defendant further specifically denies that this defendant failed and refused to operate as a common carrier and to perform its duty to plaintiff as such and that plaintiff has been damaged in the sum of not less than $350,000.00.

6. For its further answer to the allegations thereof, this defendant affirmatively alleges that Petition herein fails to state a claim on which any relief can be granted.

7. For its further answer to the allegations thereof, this defendant affirmatively alleges that, at all times material hereto, this defendant was a common carrier by railroad was engaged in the interstate transportation of freight for hire, and the furnishing of services in connection therewith, and was subject to the provisions of the Interstate Commerce Act, 49 U.S.C.A. §§ 1, *et seq.*

8. For its further answer to the allegations thereof, this defendant affirmatively alleges that, at all times material hereto, this defendant was the owner of a line of railroad which ran from Mile Post 222.0 in Fort Dodge, Iowa, to Mile Post 227.6 at Kalo, Iowa, a distance of 5.6 miles.

9. For its further answer to the allegations thereof, this defendant affirmatively alleges that, prior to April of 1973, this defendant provided its services as a common carrier by railroad to the facility owned and operated by plaintiff at Kalo, Iowa, by means of said line of railroad.

10. For its further answer to the allegations thereof, this defendant affirmatively alleges that, prior to April of 1973, plaintiff shipped its products in interstate commerce from the facility owned and operated by plaintiff at Kalo, Iowa, to various points in the United States by means of said line of railroad.

11. For its further answer to the allegations thereof, this defendant affirmatively alleges that, in April of 1973, an embankment slide occurred on said line of railroad.

12. For its further answer to the allegations thereof, this defendant affirmatively alleges that said embankment slide made it impossible for this defendant to provide its services as a common carrier by railroad to the facility owned and operated by plaintiff at Kalo, Iowa, by means of said line of railroad.

13. For its further answer to the allegations thereof, this defendant affirmatively alleges that, on November 14, 1973, this defendant made application to the Interstate Commerce Commission pursuant to the provisions of the Interstate Commerce Act, 49 U.S.C.A. §§ 1, et seq., for a certificate of public convenience and necessity authorizing this defendant to abandon said line of railroad.

14. For its further answer to the allegations thereof, this defendant affirmatively alleges that said application is still pending before the Interstate Commerce Commission and the Interstate Commerce Commission has not granted or denied said application.

15. For its further answer to the allegations thereof, this defendant affirmatively alleges that, by reason of the foregoing, the sole remedies available to plaintiff

are either participation in the abandonment proceeding before the Interstate Commerce Commission pursuant to the provisions of 49 U.S.C.A. §§ 1(18) and 1(19) or a suit for an injunction pursuant to the provisions of 49 U.S. C.A. § 1(20).

16. For its further answer to the allegations thereof, this defendant affirmatively alleges that, by reason of the foregoing, this court does not have jurisdiction of the subject matter hereof.

Wherefore, having fully answered, this defendant prays that the Petition filed herein be dismissed at plaintiff's costs.

GAMBLE, RIEPE, BURT, WEBSTER
& FLETCHER
By ORIGINAL SIGNED

FRANK W. DAVIS, JR.
1021 Fleming Building
Des Moines, Iowa 50309
Telephone: 515-282-0216
Attorneys for Defendant,
Chicago and North Western
Transportation Company.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelopes in a United States Post Office depository in Des Moines, Iowa, on the 13 day of May, 1975

/s/ Barbara Natt

IN THE DISTRICT COURT OF THE STATE OF IOWA

IN AND FOR WEBSTER COUNTY

KALO BRICK & TILE COMPANY,

Plaintiff,

vs.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY, Successor in Interest in CHICAGO AND NORTHWESTERN RAILWAY COMPANY and JACK SCHMELER,

Defendants.

Law No. 45,664

ANSWER OF DEFENDANT RAILROAD TO PLAINTIFF'S AMENDMENT TO PETITION
Filed District Court '76 Oct 15

DIVISION II

For answer to Division II of plaintiff's Amendment To Petition, defendant Chicago and North Western Transportation Company states:

1. This defendant does not have sufficient information to form a belief as to the allegations contained in Paragraph 1 of Division II of plaintiff's Amendment to Petition.

2. Paragraph 2 of Division II of plaintiff's Amendment To Petition is admitted.

3. This defendant does not have sufficient information to form a belief as to the allegations contained in Paragraph 3 of Division II of plaintiff's Amendment to Petition.

4. For answer to Paragraph 4 of Division II of plaintiff's Amendment To Petition, this defendant repleads Paragraph 4 of its Separate Answer to plaintiff's Petition as if fully set out herein.

5. For answer to Paragraph 5 of Division II of plaintiff's Amendment To Petition, this defendant states that

during the early 1960s this defendant succeeded in interest to the rights, obligations and liabilities of the Minneapolis and St. Louis Railroad Company and began to operate its trains over the track referred to in plaintiff's Petition. This defendant specifically denies that defendant Schmeler ever succeeded in interest to the rights, obligations and liabilities of the Minneapolis and St. Louis Railroad Company and specifically denies that defendant Schmeler ever operated trains over the track referred to in plaintiff's Petition.

6. The allegations of Paragraph 6 of Division II of plaintiff's Amendment To Petition are specifically denied.

7. The allegations of Paragraph 7 of Division II of plaintiff's Amendment To Petition are specifically denied.

8. The allegations of Paragraph 8 of Division II of plaintiff's Amendment To Petition are specifically denied.

9. The allegations of Paragraph 9 of Division II of plaintiff's Amendment To Petition are specifically denied.

10. The allegations of Paragraph 10 of Division II of plaintiff's Amendment To Petition are specifically denied.

11. The allegations of Paragraph 11 of Division II of plaintiff's Amendment To Petition are specifically denied.

DIVISION III

For answer to Division III of plaintiff's Amendment To Petition, defendant Chicago and North Western Transportation Company states:

1. For answer to Paragraph 1 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 1 of Division II of this answer as if fully set out herein.

2. For answer to Paragraph 2 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 2 of Division II of this answer as if fully set out herein.

3. For answer to Paragraph 3 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 3 of Division II of this answer as if fully set out herein.

4. For answer to Paragraph 4 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 4 of Division II of this answer as if fully set out herein.

5. For answer to Paragraph 5 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 5 of Division II of this answer as if fully set out herein.

6. For answer to Paragraph 6 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 6 of Division II of this answer as if fully set out herein.

7. For answer to Paragraph 7 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 7 of Division II of this answer as if fully set out herein.

8. For answer to Paragraph 8 of Division III of plaintiff's Amendment To Petition this defendant repleads Paragraph 8 of Division II of this answer as if fully set out herein.

9. This defendant specifically denies the allegations of Paragraph 9 of Division II of plaintiff's Amendment To Petition.

10. The allegations of Paragraph 10 of Division III of plaintiff's Amendment To Petition are specifically denied by this defendant.

WHEREFORE, defendant Chicago and North Western Transportation Company prays that Division III of plaintiff's Amendment To Petition be dismissed at plaintiff's costs.

DIVISION IV

AFFIRMATIVE DEFENSES

As affirmative defenses to the allegations of Division II and Division III of plaintiff's Amendment To Petition, defendant Chicago and North Western Transportation Company states:

1. On November 16, 1973 this defendant filed with the Interstate Commerce Commission an Application seeking a Certificate of Public Convenience and Necessity permitting abandonment of the line of railroad ("Kalo Line") beginning at mile post 222.0 at Fort Dodge and extending in a southeasterly direction to mile post 227.6 at Kalo, Iowa, the line of railroad that is the subject of Division II and III of plaintiff's Amendment To Petition.

2. Plaintiff Kalo Brick & Tile Company was a party-protestant to the Kalo Line Abandonment proceedings before the Interstate Commerce Commission.

3. The following issues were raised in the Kalo Line Abandonment proceedings before the Interstate Commerce Commission:

(a) Had service on the line been disrupted prior to 1973 by landslides?

(b) If so, had this defendant made necessary repairs to enable continuation of service?

(c) Did a landslide occur in 1967 which, due to soil condition, could have been repaired only upon a temporary basis?

(d) When the 1967 landslide occurred, was service to shippers continued through the lease of tracks from another carrier?

(e) Did a landslide in 1973 cause cessation of operations over the tracks leased from the other carrier?

(f) What would be the cost of rehabilitation of this defendant's tracks?

(g) What would be the cost of rehabilitation of the tracks leased from the other carrier?

(h) Would such repairs be sufficient to insure continuous operations on the line?

(i) Was Kalo Brick & Tile Company the only shipper located on the line when it was last in operation?

(j) Did the cessation of service on the line occur because of willful abandonment by this defendant or did it occur because of conditions over which this defendant had no control?

(k) Under the circumstances, would continued operation of the line have been an unnecessary burden on this defendant?

4. Each of the issues set out in the preceding Paragraph 3 is also an issue in the instant lawsuit.

5. The order of Review Board Number Five of the Interstate Commerce Commission, entered April 30, 1976, rendered judgment on the issues set out in Paragraph 15 in the following manner:

(a) Service on the Kalo Line has been disrupted several times in the past by landslides.

(b) When such service disruptions occurred, this defendant made necessary repairs to enable continuation of service.

(c) In 1967 a landslide occurred which could have been repaired, but, due to the soil condition, such repairs would have been only of a temporary nature.

(d) Following the 1967 landslide, service to shippers was continued by this defendant through the lease of tracks from another carrier.

(e) In 1973 a landslide caused the cessation of operations over the track this defendant had leased from another carrier.

(f) The cost of rehabilitation of this defendant's railroad line would have been in excess of $150,000.

(g) The cost of rehabilitation of the track leased from the other carrier would have been in excess of $100,000.

(h) Due to soil condition and mining activities in the area, such repairs would not have been sufficient to insure continuous operation on the Kalo Line.

(i) Plaintiff Kalo Brick & Tile Company was the only shipper located on the line when it was last in operation.

(j) The cessation of service on the Kalo Line occurred because of conditions over which this defendant had no control, and not because of any intent by this defendant to abandon the line or cause a cessation of service.

(k) Under the circumstances, continued operation of the line would have been an unnecessary burden on this defendant.

6. By order of Review Board Number Five, entered April 30, 1976, the Board determined that the public convenience and necessity justified abandonment by this defendant of the Kalo Line.

7. By order of Review Board Number 5, entered April 30, 1976, protestant Kalo Brick & Tile Company was deemed to be in default and entitled to no further formal proceedings before the Commission. Protestant Kalo Brick & Tile Company was later allowed to file a Petition for Reconsideration.

8. By order entered September 23, 1976, served September 30, 1976, and received by this defendant's trial counsel October 8, 1976, the Interstate Commerce Commission, Division Three, acting as an Appellate Division, denied protestant Kalo Brick & Tile Company's Petition for Reconsideration and determined:

(a) That the order of the Commission, Review Board Number Five, was not shown to be erroneous on the basis of the record made by the parties complying with the order for modified procedure.

(b) That protestant Kalo Brick & Tile Company's Petition For Reconsideration set forth no material facts or arguments in addition to those previously considered in the proceeding.

(c) That no showing had been made by protestant Kalo Brick & Tile Company warranting reconsideration of the order of the Commission, Review Board Number Five.

9. The issues set out in Paragraph 3 of this Division IV have been determined by a valid final judgment to which such determination was necessary, and relitigation of those issues in the instant lawsuit is therefore precluded.

10. This defendant repleads Paragraph 6 of its Separate Answer to plaintiff's Petition as if fully set out herein.

11. This defendant repleads Paragraph 7 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

12. This defendant repleads Paragraph 8 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

13. This defendant repleads Paragraph 9 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

14. This defendant repleads Paragraph 10 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

15. This defendant repleads Paragraph 11 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

16. This defendant repleads Paragraph 12 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

17. This defendant repleads Paragraph 13 of its Separate Answer to plaintiff's Original Petition as if fully set out herein.

18. For its further answer to the allegations thereof, this defendant affirmatively alleges that, by reason of the foregoing, the sole remedies available to plaintiff were either participation in the Kalo Line Abandonment proceeding before the Interstate Commerce Commission pursuant to the provisions of 49 USCA Sections 1 (18) and 1 (19) or a suit for an injunction pursuant to the provisions of 49 USCA Section 1 (20).

19. This defendant hereby repleads Paragraph 16 of its Separate Answer to plaintiff's Petition as if fully set out herein.

WHEREFORE, this defendant prays that Divisions II and III of plaintiff's Amendment To Petition be dismissed at plaintiff's costs.

GAMBLE, RIEPE, BURT, WEBSTER
& FLETCHER
By /s/ James D. Polson
By /s/ Bruce Johnson
2600 Ruan Center
Des Moines, Iowa 50309
(515) 243-6251
—Attorneys for Defendant

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR WEBSTER COUNTY

KALO BRICK & TILE COMPANY,

Plaintiff,

vs.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY, Successor in Interest in CHICAGO AND NORTHWESTERN RAILWAY COMPANY and JACK SCHMELER,

Defendants.

Law No. 45,664

MOTION FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT RAILROAD AND DEFENDANT SCHMELER
(Filed Oct 18 76)

The Defendant Chicago and North Western Transportation Company and Defendant Schmeler respectfully move the Court for an Order granting summary judgment in favor of Defendants and against Plaintiff Kalo Brick & Tile Company, and as grounds therefore state:

1. On November 16, 1973 the Defendant Railroad filed with the Interstate Commerce Commission an Application seeking a Certificate of Public Convenience and Necessity permitting abandonment of the Kalo Line.

2. Plaintiff Kalo Brick & Tile Company was a party-protestant to the Kalo Line Abandonment Proceedings before the Interstate Commerce Commission.

3. In the Kalo Line Abandonment Proceedings the Interstate Commerce Commission made the following factual determinations:

(a) Service on the Kalo Line has been disrupted several times in the past by landslides.

(b) When such service disruptions occurred, this defendant made necessary repairs to enable continuation of service.

(c) In 1967 a landslide occurred which could have been repaired, but, due to the soil condition, such repairs would have been only of a temporary nature.

(d) Following the 1967 landslide, service to shippers was continued by this defendant through the lease of tracks from another carrier.

(e) In 1973 a landslide caused the cessation of operations over the track this defendant had leased from another carrier.

(f) The cost of rehabilitation of this defendant's railroad line would have been in excess of $150,000.

(g) The cost of rehabilitation of the track leased from the other carrier would have been in excess of $100,000.

(h) Due to soil condition and mining activities in the area, such repairs would not have been sufficient to insure continuous operation on the Kalo Line.

(i) Plaintiff Kalo Brick & Tile Company was the only shipper located on the line when it was last in operation.

(j) The cessation of service on the Kalo Line occurred because of conditions over which this defendant had no control, and not because of any intent by this defendant to abandon the line or cause a cessation of service.

(k) Under the circumstances, continued operation of the line would have been an unnecessary burden on this defendant.

4. The factual determinations listed above in Paragraph 3 are now part of and were necessary to a valid and final judgment of the Interstate Commerce Commission in the Kalo Line Abandonment Proceedings.

5. The issues decided by the factual determinations listed above in Paragraph 3 are material to the claim contained in Plaintiff's original Petition and to the claims contained in Division II and III in Plaintiff's Amendment to Petition.

6. The prior determination of the factual matters listed above in Paragraph 3 by the Interstate Commerce Commission in a proceeding to which Plaintiff Kalo Brick & Tile Company was a party precludes Plaintiff from relitigating those factual issues in the present litigation.

7. When the factual determinations of the Interstate Commerce Commission listed above in Paragraph 3 are adopted and applied to the claims made by the Plaintiff in the present lawsuit there remains no genuine question of material fact, and Plaintiff has, as a matter of law, failed to prove the claims stated in its original Petition and in Divisions I and II of its Amendment to Petition.

Wherefore, Defendant Chicago and North Western Transportation Company and Jack Schmeler pray that the Court grant this Motion For Summary Judgment in favor of Defendants and against the Plaintiff and dismiss this action, with costs taxes to the Plaintiff.

GAMBLE, RIEPE, BURT, WEBSTER,
& FLETCHER
By /s/ Bruce E. Johnson
Bruce E. Johnson
By /s/ J D Polson
James D. Polson
Attorneys for Defendants

Of Counsel
Gamble, Riepe, Burt, Webster & Fletcher
2600 Ruan Center
Des Moines, Iowa 50309
(515) 243-6251

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Des Moines, Iowa
on the 18th day of Oct. 1976

/s/ B. Johnson

IN THE DISTRICT COURT OF THE STATE OF IOWA
IN AND FOR WEBSTER COUNTY

KALO BRICK & TILE COMPANY,

Plaintiff,

vs.

CHICAGO AND NORTHWESTERN TRANSPORTATION COMPANY, Successor in Interest in CHICAGO AND NORTHWESTERN RAILWAY COMPANY and JACK SCHMELER,

Defendants.

Law No. 45,664

DEFENDANT RAILROAD'S MOTION TO DISMISS
(Filed Nov 2 76)

Pursuant to a Stipulation of Record with plaintiff's Counsel that this Motion To Dismiss shall be treated as though it was first made at the close of plaintiff's evidence and renewed now at the close of all the evidence, the defendant Chicago and North Western Transportation Company resptctfully submits the following Motion To Dismiss:

DISMISSAL OF PLAINTIFF'S ORIGINAL PETITION

The defendant Chicago and North Western Transportation Company respectfully moves that the claim for relief alleged in plaintiff's Original Petition filed on or about September 16, 1974, be dismissed and in support thereof states the following grounds:

1. This defendant incorporates in this paragraph as if fully set out herein this defendant's Motion For Summary Judgment filed in this court on or about May 29, 1975, the affidavit of Frank Davis, Jr. filed therewith, and the Memorandum Brief filed in support of that Motion For Summary Judgment.

2. This defendant incorporates in this paragraph as if fully set out herein its Motion For Summary Judgment

filed on October 18, 1976 and the supporting Memorandum Brief filed therewith.

3. After April 4, 1973, this defendant had no duty to provide car service to plaintiff's plant because on that date this defendant's railroad line to plaintiff's plant became impassable and plaintiff was notified that car service could not be provided.

4. This defendant had no duty to provide car service from April 4, 1973, until the time plaintiff decided to close down its business because during that time period plaintiff placed no legally sufficient orders for cars to be delivered to plaintiff's plant.

5. This defendant had no duty to provide car service to plaintiff's plant at any time after April 4, 1973, because after that date plaintiff placed no legally sufficient orders for cars to be delivered to plaintiff's plant.

6. There is not sufficient evidence to support a finding that this defendant has committed a breach of any applicable common law or statutory duty to provide car service to plaintiff.

7. There is not sufficient evidence to support a finding that this defendant has committed a breach of any applicable common law or statutory duty to provide car service that was a proximate cause of the closing of plaintiff's business or damages claimed therefor.

8. Even if this defendant is guilty of any breach of a duty to plaintiff to provide car service, there is not sufficient evidence to support a finding that any such breach by this defendant was the proximate cause of any damages that are legally recoverable by a shipper for breach by a carrier of a duty to provide car service.

9. There is not sufficient evidence to support a finding that this defendant had timely and effective notice that cessation of rail service to plaintiff's plant would cause

plaintiff to close down its business, and therefore this defendant cannot be liable for the special damages claimed by plaintiff for loss of value of plaintiff's business.

10. This Court has no subject matter jurisdiction in this action and therefore has no power to rule on plaintiff's claim. This defendant's rail service was at all times utilized by plaintiff only for interstate shipments. 49 USCA §§1, 8, 9, 16, and other applicable sections of the Interstate Commerce Act, constitute the applicable law in this case. Claims for damages like the present one that arise under the Interstate Commerce Act can be prosecuted only in a United States District Court, or before the Interstate Commerce Commission. A state court of original jurisdiction does not have subject matter jurisdiction over plaintiff's claim for relief.

11. This Court has no subject matter jurisdiction over plaintiff's claim and therefore has no power to rule on it because a ruling on the merits of this case necessitates the determination of questions that raise issues of transportation policy which ought to be considered by the Interstate Commerce Commission in the interest of effecting the uniform and expert administration of the regulatory scheme laid down by the Interstate Commerce Act. The primary jurisdiction doctrine requires that the questions that raise issues of transportation policy should be determined by the Interstate Commerce Commission and not by a state court of original jurisdiction.

12. There is no sufficient evidence to support a finding that this defendant is guilty of willful and malicious conduct as alleged in plaintiff's claim for exemplary damages.

Wherefore, defendant Chicago and North Western Transportation Company prays that the Court render judgment dismissing the claim alleged in Plaintiff's Original Petition and taxing costs to the plaintiff.

DISMISSAL OF DIVISION II OF PLAINTIFF'S AMENDMENT TO PETITION

The defendant Chicago and North Western Transportation Company respectfully moves that the claim for relief alleged in Division II of Plaintiff's Amendment To Petition be dismissed and in support thereof states the following grounds:

13. There is not sufficient evidence to support a finding that this defendant was guilty of any negligence in the maintenance of the roadbed of its railroad line to plaintiff's plant.

14. There is not sufficient evidence to support a finding that this defendant was guilty of any negligence in maintaining its roadbed that was a proximate cause of the closing of plaintiff's business or the damages claimed therefor.

15. Even if this defendant is guilty of negligence in failing to maintain its roadbed, plaintiff is not entitled to recover damages for the value of its business because such damages for economic loss where there is no physical damage to plaintiff's property and no intent by defendant are, under the facts of this case, too remote to be recoverable and are not a proper element of damage.

16. Under the facts of this case the plaintiff is not a party contemplated by §479.122 of the Iowa Code as one entitled to recover damages under that statute.

17. Plaintiff cannot recover for damage to property under §479.122 because that statute provides a right to recover only for personal injuries sustained.

18. There is no sufficient evidence to support a finding that this defendant is guilty of willful and malicious conduct as alleged in plaintiff's claim for exemplary damages.

19. If this defendant does owe any duty to plaintiff under the facts of this case to maintain its roadbed

with ordinary care, any such duty is dependent upon the existence of a duty owed by this defendant to plaintiff to provide car service, and any duty this defendant may owe to plaintiff to maintain its roadbed with ordinary care cannot extend beyond the limits of the duty this defendant may have to provide car service to plaintiff. In Divisions II and III of Plaintiff's Amendment To Petition, plaintiff alleges as a necessary element of its claims for relief in those Divisions II and III a breach by this defendant of its duty to provide car service under the laws and statutes of the State of Iowa. This defendant therefore states as grounds for dismissal of plaintiff's Division II the following reasons, all of which have previously been set out in paragraphs 1-11 of this Motion as grounds for dismissal of Plaintiff's Original Petition:

a. This defendant incorporates in this paragraph as if fully set out herein this defendant's Motion For Summary Judgment filed in this court on or about May 29, 1975, the affidavit of Frank Davis, Jr. filed therewith, and the Memorandum Brief filed in support of that Motion For Summary Judgment.

b. This defendant incorporates in this paragraph as if fully set out herein its Motion For Summary Judgment filed on October 18, 1976 and the supporting Memorandum Brief filed therewith.

c. After April 4, 1973, this defendant had no duty to provide car service to plaintiff's plant because on that date this defendant's railroad line to plaintiff's plant became impassable and plaintiff was notified that car service could not be provided.

d. This defendant had no duty to provide car service from April 4, 1973, until the time plaintiff decided to close down its business because during that time period plaintiff placed no legally sufficient orders for cars to be delivered to plaintiff's plant.

e. This defendant had no duty to provide car service to plaintiff's plant at any time after April 4, 1973, because after that date plaintiff placed no legally sufficient orders for cars to be delivered to plaintiff's plant.

f. There is not sufficient evidence to support a finding that this defendant has committed a breach of any applicable common law or statutory duty to provide car service to plaintiff.

g. There is not sufficient evidence to support a finding that this defendant has committed a breach of any applicable common law or statutory duty to provide car service that was a proximate cause of the closing of plaintiff's business or damages claimed therefor.

h. Even if this defendant is guilty of any breach of a duty to plaintiff to provide car service, there is not sufficient evidence to support a finding that any such breach by this defendant was the proximate cause of any damages that are legally recoverable by a shipper for breach by a carrier of a duty to provide car service.

i. There is not sufficient evidence to support a finding that this defendant had timely and effective notice that cessation of rail service to plaintiff's plant would cause plaintiff to close down its business, and therefore this defendant cannot be liable for the special damages claimed by plaintiff for loss of value of plaintiff's business.

j. This Court has no subject matter jurisdiction in this action and therefore has no power to rule on plaintiff's claim. This defendant's rail service was at all times utilized by plaintiff only for interstate shipments. 49 USCA §§1, 8, 9, 16, and other applicable sections of the Interstate Commerce Act, constitute the applicable law in this case. Claims for damages like the present one that arise under the Interstate Commerce Act can be prosecuted only in a United States District Court, or before the Interstate Commerce Commission. A state court of

original jurisdiction does not have subject matter jurisdiction over plaintiff's claim for relief.

k. This Court has no subject matter jurisdiction over plaintiff's claim and therefore has no power to rule on it because a ruling on the merits of this case necessitates the determination of questions that raise issues of transportation policy which ought to be considered by the Interstate Commerce Commission in the interest of effecting the uniform and expert administration of the regulatory scheme laid down by the Interstate Commerce Act. The primary jurisdiction doctrine requires that the questions that raise issues of transportation policy should be determined by the Interstate Commerce Commission and not by a state court of original jurisdiction.

Wherefore, defendant Chicago and North Western Transportation Company prays that the Court render judgment dismissing the claim alleged in Division II of Plaintiff's Amendment To Petition and taxing costs to the plaintiff.

DISMISSAL OF DIVISION III OF PLAINTIFF'S AMENDMENT TO PETITION

The defendant Chicago and North Western Transportation Company respectfully moves that the claim for relief alleged in Division III of Plaintiff's Amendment To Petition be dismissed and in support thereof states the following grounds:

20. This defendant repleads paragraph 13 of this Motion To Dismiss as if fully set out herein.

21. There is not sufficient evidence to support a finding that this defendant was guilty of any negligence in maintaining its roadbed that was a proximate cause of the alleged loss by plaintiff of future income from unfulfilled contracts.

22. Even if this defendant is guilty of negligence in failing to maintain its roadbed, plaintiff is not entitled to recover damages for loss of future income from unfulfilled contracts because such damages for economic loss where there is no physical damage to plaintiff's property and no intent by defendant are, under the facts of this case, too remote to be recoverable and are not a proper element of damage.

23. This defendant repleads paragraph 16 of this Motion To Dismiss as if fully set out herein.

24. This defendant repleads paragraph 17 of this Motion To Dismiss as if fully set out herein.

25. This defendant repleads paragraph 18 of this Motion To Dismiss as if fully set out herein.

26. This defendant repleads paragraph 19 of this Motion To Dismiss as if fully set out herein and hereby states as grounds for dismissal of Division III of Plaintiff's Amendment To Petition the reasons set forth in paragraph 18, including subparagraphs 19(a)-19(k).

27. If plaintiff is granted recovery under Division II of Plaintiff's Amendment To Petition, plaintiff cannot recover under Division III because alleged loss of future income from unfulfilled contracts claimed in Division III is an element included in the value of plaintiff's business claimed as damages in Division II. Allowing recovery for damages claimed in both Division II and III would amount to allowing plaintiff a double recovery.

Wherefore, defendant Chicago and North Western Transportation Company prays that the Court render judgment dismissing the claim alleged in Division III

of Plaintiff's Amendment To Petition and taxing costs to the plaintiff.

GAMBLE, RIEPE, BURT, WEBSTER,
& FLETCHER
By /s/ J D Polson
James D. Polson
By /s/ Bruce E. Johnson
Bruce E. Johnson
2600 Ruan Center
Des Moines, Iowa 50309
(515) 243-6251
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Des Moines, Iowa
on the 18th day of Oct. 1976

/s/ B. Johnson

Supreme Court, U. S.
FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-1336

In the
Supreme Court of the United States

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

JOINT APPENDIX

Louis T. Duerinck
James P. Daley
Stuart F. Gassner
400 West Madison Street
Chicago, Illinois 60606
Telephone: (312) 453-6506

Frank W. Davis, Jr.
Bruce E. Johnson
2600 Ruan Center
Des Moines, Iowa 50309
Telephone: (515) 243-6251
Attorneys for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

INDEX TO JOINT APPENDIX

APPENDIX	PAGE
I. PLEADINGS	77
Petition	77
Amendment to Petition	78
II. Transcript of Testimony	82
Jerry Kiliper	
Direct Examination	82
Merlyn G. Spangler	
Direct Examination	87
Cross-Examination	93
Redirect Examination	94
Recross-Examination	94
Jack Chmeler	
Direct Examination	96
Herbert O. Ireland	
Direct Examination	98
Cross-Examination	107
R. J. Christensen	
Direct Examination	108
Cross-Examination	115
Redirect Examination	116
Jerry Kiliper	
Direct Examination	117
Jerry Schnurr	
Direct Examination	117
Maurice Reid	
Direct Examination	119
Cross-Examination	125
Raymond E. Snyder	
Direct Examination	128
III. Deposition of Raymond Burks	130

INDEX TO APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

APPENDIX: Page

Order of the Supreme Court of Iowa 1a

Opinion of the Court of Appeals of Iowa 2a-12a

Findings of Fact, Conclusions of Law, and Judgment of the District Court of the State of Iowa in and for Webster County 12a-33a

April 30, 1976, Order of the Interstate Commerce Commission 33a-40a

September 23, 1976, Order of the Interstate Commerce Commission 40a-41a

Excerpt of Testimony of Plaintiff's Officer Jerry Schnurr 42a

Constitutional Provisions and Statutes 42a-52a

Answer of Chicago and North Western Transportation Company to Plaintiff's Petition 52a-56a

Answer of Chicago and North Western Transportation Company to Plaintiff's Amendment to Petition 57a-64a

Motion for Summary Judgment Filed by Chicago and North Western Transportation Company ..64a-67a

Motion to Dismiss Filed by Chicago and North Western Transportation Company 68a-76a

RELEVANT DOCKET ENTRIES

September 13, 1974	Petition
October 4, 1974	Notice of Removal
	Petition for Removal
October 7, 1974	Motion to Dismiss
October 18, 1974	Motion to Remand
November 6, 1974	Resistance to Motion to Remand
May 1, 1975	Order
May 14, 1975	Separate Answer of Chicago and North Western Transportation Company
May 21, 1975	Motion for Summary Judgment Against Chicago and North Western Transportation Company
May 30, 1975	Motion for Summary Judgment of Chicago and North Western Transportation Company
May 30, 1975	Resistance to Motion for Summary Judgment Against Chicago and North Western Transportation Company
July 1, 1975	Order on Motions for Summary Judgment
April 28, 1976	Amendment to Petition
October 15, 1976	Answer of Chicago and North Western Transportation Company to Plaintiff's Amendment to Petition
April 30, 1976	Motion to Strike
May 3, 1976	Request for Admissions
May 21, 1976	Response to Request for Admissions

May 26, 1976	Order on Motion to Strike and Motion for Leave to Amend
May 30, 1976	Motion for Leave to File Amendment to Petition
October 18, 1976	Motion for Summary Judgment in favor of Defendant Chicago and North Western Transportation Company
October 18, 1976	Motion in Limine
July 29, 1977	Findings of Fact, Conclusions of Law and Judgment
August 8, 1977	Notice of Appeal

JOINT APPENDIX

I. PLEADINGS AND MOTIONS

PETITION

COMES NOW the Plaintiff and for its cause of action states:

1. That it is an Iowa Corporation with its principal place of business at Fort Dodge, Iowa.

2. That the Defendant is a railroad operating in Webster County, Iowa, which is now known as the Chicago and Northwestern Transportation Company which succeeded to all of the rights and liabilities of the Chicago and Northwestern Railway Company. That the Defendant, Jack Chmeler, is and was an agent for the Chicago and Northwestern Transportation Company, and its predecessor at Fort Dodge, Iowa, and Kalo, Iowa, and he and his predecessor agents have been in charge of the operation of the business of the Chicago and Northwestern Transportation Company and its predecessor at all times material hereto.

3. Until April of 1973 the Plaintiff operated a manufacturing plant at Kalo, Webster County, Iowa, where it made clay products for sale and shipment by railroad to different parts of the United States where it had sold its products and the Plaintiff had been so engaged in the manufacture of clay products for more than 50 years. That in connection with the operation of its business, the Plaintiff hired employees, some of whom worked in the Plaintiff's business office in Fort Dodge, Iowa, and others at its plant in Kalo, Iowa.

4. That the Defendants operated as a railroad common carrier in Webster County, Iowa, and in particular a line from Fort Dodge, Iowa, to Kalo, Iowa, and to the Plaintiff's plant. That for many years, the foregoing line of

track was operated by the Defendants and its predecessors. That for many years the Plaintiff shipped its manufactured products over the Defendants' line and built up its business on the basis of the railroad service that was available until April of 1973.

5. That prior to April of 1973, the Defendants have railroad services to the Plaintiff and after April of 1973 the Defendants failed and refused to give service to the Plaintiff or to furnish it any railway cars or to send trains to the Plaintiff's plant at Kalo, Iowa, which is located immediately adjacent to the tracks of the Defendants. The Plaintiff made repeated requests for service and for cars to the Defendant, its agents, and in particular, its agent the Defendant, Jack Chemler. That the said Defendants failed and refused to perform the common law and statutory duties of a common carrier of freight and in particular their duties to the Plaintiff; and that as a result, it was impossible for the Plaintiff to continue the operation of its business and it was forced to discontinue the operation of its business and it was forced to discontinue its business and to dispose of its manufacturing equipment and property at a substantial loss; that as a result, the Plaintiff was forced to give up its business resulting in substantial damages to it. That as a result of the Defendants' failure and refusal to operate as a common carrier and to perform its duty to the Plaintiff as such, the Plaintiff has been damaged in the sum of not less than $350,000.00.

WHEREFORE, Plaintiff PRAYS for judgment against the Defendants in the sum of $350,000.00 and for costs.

AMENDMENT TO PETITION

COMES NOW the Plaintiff and for its Amendment to the Petition heretofore filed states as follows:

DIVISION II

1. That it realleges and incorporates herein by this reference paragraph 1 of Division I, the original Petition filed herein.

2. That the Defendant, Chicago & Northwestern Transportation Company, is a railroad operating in Webster County, Iowa, which is now known as the Chicago & Northwestern Transportation Company which succeeded to all rights and liabilities of the Chicago & Northwestern Railway Company.

3. That it realleges and incorporates herein by this reference paragraph 3 of Division I, its original Petition herein.

4. That it realleges and incorporates herein by this reference paragraph 4 of Division I, its original Petition herein.

5. During the early 1960's, the exact date of which is not known to this Plaintiff, the Defendants succeeded in interest to the rights, obligations and liabilities of the Minneapolis and St. Louis Railroad Company and began to operate its trains over the track referred to in Division I of this Petition.

6. From that period forth until April of 1973, the Defendants failed to maintain the track in a proper manner, neglected and refused to make switches (delivery of cars on order) on a regular basis, and from time to time delivered cars to the Plaintiff which were unsuitable for use by reason of being dirty, broken and unroadworthy.

7. In addition thereto the Defendants failed and neglected to properly maintain the railroad right-of-way in that the Defendants and its agents permitted water to accumulate on the west side thereof which accumulation of water weakened the railroad bed and caused it to fail.

8. As a result of the Defendants' failure to exercise reasonable care in maintaining the railroad bed, in April of 1973 the track failed and the Defendants were no longer able to provide service to this Plaintiff as required by the laws and statutes of the State of Iowa.

9. That the negligence of the Defendants, its agents and employees was the proximate cause of the Plaintiff's injuries as hereinafter set forth.

10. That as a result of the Defendants' negligence aforesaid, the Plaintiff was forced to close its business because it was unable to find another economical means of transportation to transport its products and the negligence of the Defendants was the proximate cause of the Plaintiff's injuries.

11. That prior to 1973 the Plaintiff's company was a viable, existing company engaged in the manufacture of clay brick, was without debt and as a result of the Defendants' negligence, the Plaintiff was forced to close and as a proximate cause thereof was damaged in the amount of $350,000.00. That the Plaintiff alleges that said neglect of its duty to the Plaintiff was a part of a general overall scheme on behalf of the Defendants to close "unproductive" lines and that by reason thereof said neglect was malicious and was for the purpose of forcing the Plaintiff out of business.

WHEREFORE, the Plaintiff PRAYS for judgment against the Defendants in Division II herein in the amount of $150,000.00 and further PRAYS for punitive damages in the amount of $150,000.00 together with interest and costs of this action.

DIVISION III

The Plaintiff for Division III of its Petition states:

1. That it realleges and incorporates herein by this reference paragraph 1 of Division II.

2. That it realleges and incorporates herein by this reference paragraph 2 of Division II.

3. That it realleges and incorporates herein by this reference paragraph 3 of Division II.

4. That it realleges and incorporates herein by this reference paragraph 4 of Division II.

5. That it realleges and incorporates herein by this reference paragraph 5 of Division II.

6. That it realleges and incorporates herein by this reference paragraph 6 of Division II.

7. That it realleges and incorporates herein by this reference paragraph 7 of Division II.

8. That it realleges and incorporates herein by this reference paragraph 8 of Division II.

9. That during said period of time, and at all times material hereto, it was the avowed and publicized purpose of the Defendants to close all unproductive lines under its control.

10. That, at all times material, the Plaintiff had existing business relations and contacts with distribution of its products in Illinois, Minnesota, Michigan, North Dakota and Nebraska; that the acts of the Defendants were such as to substantially interfere with Plaintiff's existing and future contracts.

That as a result of Defendants' acts of interference with Plaintiff's contracts, the Plaintiff was damaged in the amount of $100,000.00.

WHEREFORE, the Plaintiff PRAYS for judgment in the amount of $100,000.00 in Division III hereof, together with interest and costs of this action.

II. TRANSCRIPT OF TESTIMONY

(October 19, 20, 21, 22 and 26, 1976)

• • •

JERRY KILIPER

DIRECT EXAMINATION

BY MR. BLACKBURN:

Q. Would you state your name, please? A. Jerry Kiliper.

• • •

(Tr. p. 7)

• • •

Q. What is your education, sir? A. I graduated from Iowa State University with a Bachelor of Science in Engineering.

• • •

Q. Now, are you an officer in the Kalo Brick and Tile Company? A. Yes, I am. I am president.

Q. And you hold any other official title? A. General manager.

(Tr. p. 8)

• • •

(Tr. p. 19)

• • •

Q. Are you familiar with the competitive nature of the brick industry? A. Yes. It is a very competitive industry. It is predicated on normally an F.O.B. site price in most cases, and, of course, the larger areas and the larger projects are a lot more competitive than the smaller projects and I am talking about a smaller project very possibly somebody putting a thousand brick on a front of a home. This would not be very competitive, but you start talking about a project that could take in excess of three to five million brick over a period of time, this is a competitive type project.

• • •

(Tr. p. 20)

Q. How would the freight rate effect your ability to be competitive in the market? A. Well, of course, we sold our product as I stated previously on an F.O.B. plant basis and the distributor was paying the freight or transportation charges and, of course, he was looking at the total on site price of the product because this is a price, its cost, he had to use to enable him to sell the product. And, of course, if this price would become far out of line, it was a good chance he would not sell this product and another product of a more competitive nature could be used.

• • •

(Tr. p. 25)

• • •

MR. BLACKBURN: Q. Mr. Kiliper, what was the method of transportation used by the Kalo Brick and Tile Company from the date of its inception in 1888 or 1890 to April of 1973?

THE WITNESS: A. We used the rail service as a method of transportation.

Q. And by whom was that rail service supplied? A. Well, originally it was supplied by the Minneapolis-St. Louis Railroad. Later years it was supplied by the Chicago Northwestern Transportation Company which took over the M & St. L Railroad.

• • •

(Tr. p. 28)

MR. BLACKBURN: Q. What kind of service did you get from the M & St. L?

(Tr. p. 29)

A. Service from Minneapolis-St. Paul—or M & St. L was excellent. They switched us. In other words, provided us empty boxcars and took out our loaded cars each evening after working hours.

Q. And that was up till approximately what period of time? A. Up until—I don't know the exact date. Up until the Chicago & Northwestern acquired the assets of the Minneapolis-St. Louis Railroad.

Q. And describe then in a general way how the — what kind of service you got off the Chicago & Northwestern after they took over the line? A. Well, the Chicago & Northwestern—after the Chicago & Northwestern took over the line, service started to deteriorate. The evening switches were no longer in effect. They stated they would switch us during our working hours at the noon period and in all sincerity did they get there at noon. It was anytime from nine o'clock in the morning until five o'clock in the afternoon and maybe not at all. And I must say that the service was nearly—not nearly as good with the Chicago & Northwestern as it was with the M & St. L previously.

Q. Now, what, can you describe in a general way the kind of cars that you received from the Chicago & Northwestern? A. Well, of course, we would order cars for loading of clay products in them and the cars to be designated for clay products loading, they

(Tr. p. 30)

were rough boxcars. But, some of the cars we got had holes in the bottom, tankage in them. They were filthy dirty and we did everything in our power to clean these cars up and make them suitable for loading. In fact, in some cases we had to nail pieces of metal over the floors of the cars to make them suitable to carry the product.

Q. • • • During one of the latter years of the 1960's was service curtailed for a period of time? A. Yes, and I can't recollect exact dates, but I could look it up and come up with these dates, but in the latter part of the 1960's we had a problem with service from January until May of that year.

Q. And what was the cause of that particular problem? A. Well, the railroad contended that it was a poor situation on their track at that time.

Q. What part of the track were you referring to with regard to that problem in the late '60's? A. It would be a general track condition on the entire portion of the track, but primarily was concerned with the M & St. L portion of the track.

• • •

(Tr. p. 31)

• • •

Q. Now, Mr. Kiliper, was the problem subsequently worked out? A. They came in and repaired the track and at that time and service was given back to us on the 30th of May of that year after many many months of negotiations and pressure put on the railroad by various people.

• • •

(Tr. p. 32)

Q. • • • From, say, May of 1968 until 1973 in April, were you familiar with or have you acquainted yourself with the volume of business that the Kalo Brick and Tile Company was giving the Chicago & Northwestern? A. Well, of course, our business was increasing. We had thought we had solved our railroad problems of the past and that things were going along. We had developed some new customers. Our volume was increasing because of the acceptance of our product and things were going along quite well during this period of time.

Q. Do you know how many cars were being shipped per year per mile about that time? A. Well, we were in excess of any regulatory amount and we were up, I guess, in the forty to fifty cars per mile range and some years above that.

Q. That's forty to fifty cars per mile per year? A. That's right.

Q. Incidentally, what was the distance of the line to the main track at Fort Dodge? A. About five and a half miles approximately.

• • •

(Tr. p. 34)

Q. Prior to April 4th of 1973, did the people at Kalo become aware of some problems along this track particularly about where you marked it with an "x" on Defendant's Exhibit W? A. Yes, we did. We noticed some water standing in that area and we tried to open the culvert up in that area and get the water drained from the upper portion of the track.

Q. Did you see the culvert or any part of it?
(Tr. p. 35)
A. I saw the outfall.

• • •

Q. Did you see a culvert under the track? A. I saw the outfall into the culvert.
Q. And did any of the people from Kalo try to drain that culvert or drain that water which— A. We tried to pump the water over the top of the track to drain the uphill side of it so we could find the culvert and see what was blocking the inlet portion of the culvert.
Q. And were you successful in doing that? A. No.
Q. Do you remember when that occurred? A. It was in March of 1973.

• • •

(Tr. p. 40)
Q. After the railroad line was taken out of service, how did that effect the position of the Kalo Brick and Tile Company in—how did it effect Kalo's competitive position in the brick market? A. Well, of course, our sales procedure was predicated on being able to deliver to our distributor by rail as previously stated in testimony and without rail service other means of transportation had to be arrived at and this left us basically two main means of transporting our product to the distributor; one, by motor freight, which would be trucking and the rates that have
(Tr. p. 41)
already been discussed on that, or loading trucks at our plant and trucking the material to the railroad in Fort Dodge and reloading said product in boxcars.

• • •

A. We notified our customers to this effect that we had no—we had no rail service and that we were going to have to try and serve them some other way and at that time the customers reported back to us that this is fine but on a long time pull they couldn't afford the increased cost of this service. And, therefore, we would be in a non-competitive type of situation in that market area.

Q. And what did this—how did it ultimately effect Kalo, the operation of the Kalo company? A. Well, it effected it to the point we couldn't be any more competitive so, you know, one does not stay in business and continue to lose money, so this was an actual demise of the company in the sense that we couldn't deliver our product on a competitive basis.

• • •

(Tr. p. 51)

• • •

Q. Did you in the ordinary course of your business receive a brochure of the Iowa Development Commission which carried an article by one Keith Peterson who is the manager of industrial development of the Chicago and Northwestern Transportation Company? A. Yes, I am sure we did.

Q. And did that brochure indicate that the railroads wished (Tr. p. 52) to eliminate their unprofitable lines? A. Yeah.

Q. I now hand you what the Court Reporter has marked Plaintiff's Exhibit 21 and ask you to state whether or not you received that brochure in the ordinary course of business? A. Yes. We receive these types of publications and this publication was in our file and we did receive it.

MR BLACKBURN: Plaintiff offers Exhibit 21.

MR. JOHNSON: No objection, Your Honor.

THE COURT: Exhibit 21 is admitted.

• • •

(Tr. p. 53)

• • •

(Tr. p. 145)

• • •

MERLYN G. SPANGLER,

DIRECT EXAMINATION

BY MR. BLACKBURN:

Q. Would you state your name for the record, please?

(Tr. p. 146)

A. My name is Merlyn G. Spangler. I live at 1517 Grand Avenue in Ames, Iowa.

Q. Do you mind telling the Judge how old you are, sir? A. I am eighty-one.

Q. And what is your profession, sir? A. I am research professor of civil engineering at the Iowa State University.

Q. Now, what do you mean by the title research professor? A. Research professor is engaged in scientific research in the field of—in my case—the field of civil engineering, in addition to teaching duties in the same field.

Q. Are you still on the faculty, sir? A. Yes, sir, under special arrangements for retirement.

Q. I see. And do you have any other official titles in conection with your association with Iowa State University? A. No, sir.

Q. And would you describe your training, sir, at the undergraduate and graduate level? A. Well, I graduated from Iowa State in 1919. I went to work for the Iowa Highway Commission as a bridge designer. Five years later I went to work for the Iowa Engineering Experiment Station, which is a research arm of the College of Engineering at Iowa State. I worked fifteen years in full time in research as an assistant engineer. And then was designated half-

(Tr. p. 147)

time teaching as a research associate professor and then in 1947 was promoted to professor. My degrees are Bachelor of Science, Professional Degree of Civil Engineering, and the Masters of Science degree.

Q. Now, Professor Spangler, do you belong to any honorary societies? A. Yes, sir, I belong to Tau Beta Pi, an undergraduate honorary society, Sigma Chi, which is a research honorary organization, Phi Kappa Phi, and Chi Epsilon.

Q. Do you belong to any professional societies? A. Yes, sir. I am a member of—life member of the American Society of Civil Engineers and served as the president of the Iowa section in 1949. I am a

member of the American Society for Testing and Materials, American Society for Engineering Education, the Iowa Engineering Society, and the Highway Research Board, which is now called the Transportation Research Board of the National Research Council.

Q. Have you been awarded any special prizes as a result of your research and work in soil engineering? A. Yes, sir, I have had two awards from the Highway Research Board. One for paper of outstanding merit, another for general achievement in the field of highway research. I have had an award from the National Clay Pipe Institute, from the American Concrete Pipe Association and from the Iowa En-

(Tr. p. 148)

gineering Society.

Q. Professor, have you written any books? A. Yes, sir, I am author of the textbook *Soil Engineering,* which was first published in 1951, is now in its third edition, with a fourth edition under preparation.

Q. Is that used as a text for soil engineering in various universities throughout the United States? A. Yes, sir. The number of schools which have adopted the book fluctuates, of course, but in general, it is up in the range of thirty to thirty-five engineering schools, which have adopted the text.

Q. Now, are you a member of any special boards? A. I am not sure I understand what you mean.

Q. Well, do you belong to any special boards, advisory boards or anything of that nature or have you in the past? A. Well, I have served on committees of these various organizations which I have mentioned, which I would presume would fall in the category that you are referring to.

Q. Have you been a delegate to any national or international conferences on soil engineering on in the area of your expertise? A. Yes, sir. I was designated as the United States representative to a meeting of the OECD, that is, the Organization for Economic Cooperation and Development, which was

(Tr. p. 149)

held in Paris, France, in 1962. That, I think, besides committee assignments and preparation of papers for national organizations, meetings, annual meetings, I think, would be the answer.

Q. Professor Spangler, did you at our request or at the request of the Kalo Brick and Tile Company go to the scene of a track failure south and east of Fort Dodge, Iowa, at a switching area with Mr. Mitchell, Mr. Jerry Kiliper and Mr. Jerry Schnurr and myself? A. Yes, sir, I visited that site on July 23rd, 1975.

Q. And, can you give the Court a general description of the terrain in that area? A. Well, the terrain is quite rugged. Steep slopes. And although not—not very high hills, it is what I would describe as a rugged terrain.

Q. And I want to hand you some photographs that have been introduced into evidence and identified here as Plaintiff's Exhibit 20 and 16 and ask you to state whether or not that is a description of the track and the right-of-way as you observed it? A. Yes, sir, that coincides with my observations at the time of my visit.

Q. And I will hand you two other photographs which have been offered and received into evidence and identified as Exhibit numbers 18 and 19, which are aerial views of the same area, and ask you to state

(Tr. p. 105)

whether or not that is a fair and accurate representation of the terrain and the water as you observed it? A. Yes, it is. Both of them are.

Q. Now, Professor Spangler, did you observe the condition of the track and the roadbed at that position, make a visual observation of it? A. Yes, sir.

Q. And did you observe the general terrain in the area both on the west side of the track and on the east side of the track? A. Yes, sir.

Q. And based upon your observation—well, before I get to that question, perhaps you should describe to the Court what you observed there with respect to

the—to the condition of the track and with respect to the condition of the roadbed? A. Well, the track in the vicinity of the switch where the spur line connects with what I understood was the main line of the Fort Dodge, Des Moines and Southern was out of place and both the—horizontally and vertically, and showed evidence of the results of a failure of the railroad embankment in that area. I noticed also—first, I would say along the east side of the railroad track was a small stream, which I was told was called Gypsum Creek and the slope down to the creek was

(Tr. p. 151)

quite steep. On the other side of the track on the west side there was considerable ponded water ponded by the railroad embankment and it was obvious that ponds of water had been there for a considerable period of time because of green scum formation on the surface of the pond.

Q. Doctor, based upon your observation of the terrain and based upon your observation of the displacement of the track and the roadbed and based upon your education, experience in the field of soil engineering, and soil dynamics, do you have an opinion as to what caused the roadbed to become displaced? A. Yes, I have an opinion.

Q. And what is that opinion, sir? A. It is my opinion that the ponded water on the west side of the railroad embankment caused several phenomenon which permitted or caused the slide which had occurred. It was obvious that there was not adequate drainage beneath the railroad embankment to carry the ponded water away or accumulation of water and it is my opinion that that ponded water contributed to the slides in several different ways, one of them being a weakening of the soil due to the saturation of the embankment; another being due to hydrostatic pressure created on the upstream side of the embankment; and the third force induced in the embankment by

(Tr. p. 152)

seepage, water passing through the embankment. In addition to those forces, it appeared to me that the railroad embankment had been constructed on a slope —a rather steep slope down towards the Gypsum Creek and the normal action of gravity would tend to have an affect of pulling that embankment downward. Now, all of those forces combined plus the weakening affect of the soil due to the saturation characteristic, in my opinion, would readily be the cause of such a failure.

Q. Professor Spangler, would that be based on accepted scientific principles that are accepted generally in the area of soil engineering? A. In my opinion, yes.

Q. And what would those scientific principles be? A. Well, the one that I mentioned of a component of force tending to pull that embankment down the slope would be one. Another would be that hydrostatic force of the water accumulation or the ponded water on the upstream side. A third would be the seepage forces, which would be caused by water seeping through the embankment. And, then, in addition, the weakening of the soil both in cohesion and friction, which are the characteristics of the soil, which would tend to resist these actuating forces that I have described.

(Tr. p. 153)

Q. Doctor, did you prepare a sketch of what you observed and what you concluded? A. Yes, sir, I wrote a report.

• • •

MR. BLACKBURN: Q. I hand you what the Reporter has marked Plaintiff's Exhibit 26 and ask you to state whether or not that is a copy of the sketch or diagram that you prepared?

THE WITNESS: A. Yes, sir, it is.

Q. I understand that that is not attempted to be drawn to scale or what is your testimony with regard to this sketch? A. Well, the sketch is intended to be illustrative only of these forces which I have—the actuating forces which I have described. It is not

to scale. It is not intended to be accurate in that respect.

• • •

MR. BLACKBURN: Plaintiff offers Exhibit 26.

THE COURT: No objection by the Defendants, Exhibit 26 is admitted.

• • •

(Tr. p. 154)

CROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Spangler, did you consult any treatises in the—in reaching your conclusion concerning the cause of the collapse or failure of the roadbed? A. Did I consult with whom?

Q. Any treatises or scholarly works? A. Only my own textbook, perhaps, would be the answer to that.

Q. Okay. Did you consult any published reports on the geological structure of that area of Webster County? A. No, sir.

Q. Mr. Spangler, if the roadbed was repaired and there was adequate drainage at this spot which you inspected, would not the force of gravity continue to pull the roadbed down the slope in the future? A. Yes, sir. It would continue to contribute to the force tending to cause it to slide.

Q. Did you observe any slides of clay or mud in the area above the level of the roadbed or which originated above the level of the roadbed? A. None that I could identify as such a slide.

Q. If there was such a slide which originated above the level of the roadbed and to the west of the roadbed and above the level of the ponded water that you have included in the assumptions of fact that your opinion is based on, if there was such a slide on the west

(Tr. p. 155)

and above the level of the roadbed, the ponded water would not contribute to affecting that slide, is that correct? A. I agree with that opinion.

Q. So, then, is it your opinion, sir, based on your expertise, that the instability of slopes to the west and above the roadbed would not be affected by the existence of ponded water at or below the roadbed level? A. Only to the extent that that water which was ponded came from the area that you are describing.

• • •

REDIRECT EXAMINATION

BY MR. BLACKBURN:

Q. Well, Professor Spangler, assume the facts in this case were to show that that section of track had been used by the shipping public for a period of dating back to 1890 and assume that the track prior to the time in question of April of 1973 had never been taken out of service because of landslides and assume the fact to be that the track had carried cargo such as grain and passengers over that same section of road for a long period of years, would you then have an opinion as to what would cause that slippage?

(Tr. p. 156)

A. Well, my opinion would be the same as I have expressed that the ponded water on the upstream side would be the cause. Now, I have no knowledge of how long that ponded water existed, but, of course, such a pond would not exert a force which would be immediately effective. It would be a developing situation over a period of time.

• • •

RECROSS-EXAMINATION

BY MR. JOHNSON:

Q. Mr. Spangler, does your work concerning highways be primarily the work with culverts in determining loads on culverts and so forth? What is the proper way to put in a culvert for a certain situation? A. That's been an important part of my research, yes, sir.

Q. Have you ever had extensive experience with an area that is subject to clay or mud slides? A. Not specifically, no, sir.

• • •

(Tr. p. 158)

• • •

MR. BLACKBURN: Interrogatory No. 4. State the name or names and company title or titles of the person or persons who did in fact order a cessation of train service to the Plaintiff's plant in the spring of 1973? Answer: Defendant Northwestern knows of no such order having been given. The line was impassable. Interrogatory No. 6. I'm sorry. Interrogatory No. 5. Please describe in detail the embankment slide as alleged in paragraph 11 of your answer as it appeared on April of 1973? Answer: Plaintiff's plant is located at the end of a former M and St. L. Railways extending from Fort Dodge to Kalo, generally paralleling the Des Moines River. In the spring of 1973 service to it was accomplished by using the former Fort Dodge, Des Moines and Southern track extending generally from Fort Dodge south to Robert. (Tr. p. 159)
The two lines crossed at a point known as Shady Oak just north of the river. A track connection between the two lines left the Fort Dodge line at approximately mile post 3.7. The Fort Dodge line in the vicinity of the connection runs on a north-south direction and is on a side slope with the embankment sloping steeply upward on the west side of the track and steeply downward on the east side of the track. Two different slide areas affected this track. One slide engulfed a section of track approximately 150 feet long including the turn out for the connection to the M and St. L. track to the Kalo Brick and Tile Company. The other slide on the connecting track itself engulfed a section of track approximately 60 feet long. The embankment in the slide area failed and slid down the slide and turn out and shifted two to three feet in the alignment. Interrogatory No. 11. Please state whether or not soil compaction or other subterranean tests were made of the right-of-way in question following the alleged "embankment slide" of 1973? Answer: Such tests were not made by the Defendant Northwestern but Defendant believes that soil tests were made for the Iowa State Highway Commission in late 1972 and early 1973 for a

proposed highway which could—which would have crossed the former Fort Dodge track north of the slide area. (Tr. p. 160)

Interrogatory No. 14. State the date of the last clean out of the culvert under the railroad right-of-way from the Vincent Clay Products Company and who cleaned it? Answer: Unknown. Interrogatory No. 15. State the name of the employee in charge of maintaining and repairing culverts and waterways under the railroad involved—pardon me—under the railroad in the area involved and the time involved? Answer: These duties were performed as needed by either the track forces or bridge and building forces. These interrogatories are signed under oath by one Lewis T. Duerinck, who states he is the general solicitor of the Defendant, under oath on the 5th day of August, 1975.

• • •

(Tr. p. 163)

JACK CHMELER,

• • •

DIRECT EXAMINATION

BY MR. BLACKBURN:

Q. Would you state your name, sir? A. Jack Chmeler.

• • •

Q. And what is your occupation, sir? A. I am station administrator for the Chicago and Northwestern Transportation Company at St. Paul, Minnesota.

• • •

Q. Were you formerly stationed in Fort Dodge, Iowa—

A. (Interjecting) Yes, sir.

• • •

Q. And what period of time were you stationed in Fort

(Tr. p. 164)

Dodge as freight agent? A. Let's see. I came here July 17, 1972, and left here December 15, '74.

• • •

(Tr. p. 165)

Q. Were you present in the Courtroom yesterday when Mr. Jerry Schnurr testified as to certain conversa-

tions with you in the latter part of 1972? A. Yes, sir.

Q. Do you recall that conversation? A. I recall some of the conversations that he read out of his diary, yes, sir.

Q. And do you remember the substance of that conversation that the Chicago and Northwestern Transportation Company had agreed to provide service to the Kalo Brick and Tile Company? A. As I recall, he had several—he mentioned several instances of that type of conversation. I wasn't present at all of them. I do remember a time or two when Jerry and I discussed service problems.

Q. You did discuss service problems? A. Yes, sir.

Q. And that was prior to the slide of April, 1973, is that correct?

(Tr. p. 166)

A. Yes.

Q. And you don't dispute, I guess, the time that these conversations occurred according to his diaries? A. No.

Q. And you would have no reason to dispute the time? A. No, I really wouldn't.

Q. Was Ron Gibbons a subordinate of yours? A. Ron Gibbons was my immediate supervisor.

• • •

Q. Now, Mr. Jerry Kiliper testified yesterday that he made a note in his diary on April 13, 1972, as follows: Jack Chmeler promised in person today to get a definite schedule worked out on our service. Do you remember that conversation? A. I don't remember the exact date, but I do remember Jerry and I discussing such a thing.

Q. He also made the comment Ron Gibbons going to hire more help. Do you remember that?

(Tr. p. 167)

A. I remember during that period. I am not sure. There were several changes in hours of service and so forth along about that time whereby our crews were only permitted to work fourteen or twelve

hours as compared to originally being able to work sixteen hours on account of the unavailability of the people at the time and our inability to train them fast enough to take up the time. There were times when we were short of people. We were trying to hire people and qualify them to perform our service.

• • •

(Tr. p. 187)

HERBERT O. IRELAND

• • •

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Sir, please, sir, please state your name and your present occupation? A. Herbert O. Ireland, Professor of Civil Engineering, at the University of Illinois, Urbana-Champaign.

Q. Dr. Ireland, would you please give me a brief description of the education that you have had in the area of soil engineering? A. I have a PHD degree wherein I majored in the field of soil mechanics and foundation engineering.

Q. What is—would you describe to me what soil mechanics and foundation engineering is? A. It is the study of the geological materials of the earth's

(Tr. p. 188)

crust with relation to their uses, engineering materials in contrast to their uses for agricultural purposes.

Q. And after you obtained your doctorate degree, have you had experience in the area of soil mechanics and soil engineering? A. Yes. I have consulted on a number of projects of varying kinds in this field.

Q. Over what period of years would this be? A. Since approximately 1948.

Q. Have you had experience and/or training in studying the movement of slopes and the instability of slopes? A. Yes, sir.

Q. What, can you give me a brief description of the extent of that experience and training? A. Well, most of the things—I teach a course dealing with this—

in part with this topic of slope stability. I have consulted with a number of railroads on some of their problems involving slope stability problems.

Q. Now, Dr. Ireland, this case is, as I am sure you are aware, involves the Kalo line of the Northwestern Railroad just south of Fort Dodge, Iowa. Have you at any time had an opportunity to—

• • •

(Tr. p. 189)

Defendant's Exhibit W. Have you had an opportunity to inspect on foot the portion of the Kalo line running from say the Illinois Central line down to the junction of the Des Moines and the junction of the Des Moines, Chicago and Northwestern line and the Fort Dodge—Is that the proper name?

MR. BLACKBURN: Fort Dodge, Des Moines and Southern Line.

MR. JOHNSON: (Continuing)—Fort Dodge, Des Moines and Southern Line.

• • •

(Tr. p. 201)

• • •

MR. JOHNSON: Q. • • • Would you answer the question, Mr. Ireland, when did you make that inspection tour of that section of the line?

THE WITNESS: A. Oh, I think I answered the question, reaffirm on April 7, 1976.

Q. Who was on that tour with you, if you recall? A. Mr. Dick, Mr. Maury Reid of the Chicago and Northwestern Railroad and another Chicago and Northwestern man. I think a Mr. Christensen.

Q. R. J. Christensen? A. I believe so.

Q. Did you walk that entire section of the line? A. We traversed the entire section. We walked part of it. Some of it we traversed in a high rail vehicle.

Q. Do you have some photographs that were taken of that section of the line on or about the time of your inspection tour? A. Some photographs taken within a few days afterwards at my request, yes, sir.

Q. Okay. Mr. Ireland, would you please describe to us what you observed during your inspection tour of that line?

(Tr. p. 202)

A. The question posed to me was what was responsible for some of the problems and my first impression as we entered the line was that the slopes above the track were basically unstable. In some areas these slopes are somewhat removed from the track so they are having no influence on the track. In other areas the slopes are close to the track. In fact, the track was built on a side hill between what is now called Gypsum Creek and the adjacent higher land and much of this is in movement. There were places where there was water ponded on the uphill side of the track and there were, I believe, at least two locations where the subgrade under the track had been washed out at some time.

Q. Did you notice or observe instability of the slope along the entire or most of the section of the line from the Illinois Central Railroad down to the Chicago and Northwestern line? A. Where the slopes were reasonably close to the track, yes, this entire area seems to be more or less unstable. There were some areas where current mining activity has pushed fresh debris over the crest of the slope and in those areas you cannot judge.

Q. Now, Dr. Ireland, this is Defendant's Exhibit PPP. This does not appear to be a photograph. This appears to be some sort of a reproduction of a serial

(Tr. p. 203)

photograph, but does that accurately portray the perspective, not necessarily the detail of the configurations, but the perspective of this slope that you are talking about as it relates to the roadbed? A. This is a panoramic view that has been assembled from a number of individual photographs that shows the area from the vicinity of the Shady Oak switch to the south and the slope that is on the west side of the railroad. And it does show the slope proximity to

the railroad and I have seen glossy prints of some of these sections wherein one can identify the various portions of the slope that is in movement.

Q. Do you know who has the original of this serial photograph? A. That's a panoramic view. I understand the original prints are in the Chicago and Northwestern offices in Chicago.

Q. Are they with Maurice Reid? A. I understand they were in his office.

* * *

(Tr. p. 204)

* * *

THE COURT: Triple P is offered?

MR. JOHNSON: Yes.

THE COURT: No objection by the Plaintiff, PPP is admitted.

MR. JOHNSON: Q. Using this Exhibit PPP, can you point out to the Court, Mr. Ireland, the area that you are talking about that you feel represents an unstable slope?

A. This area from about in here and at about this time.

Q. Are we looking west? A. We are looking west, yes. The switch is in this general location to the right of this photograph and the two tracks begin to separate at that location as they approach the vicinity of the Des Moines River to the south. We are looking west and this slope from the vicinity of this switch to the limits of the photographic representation of the higher level of the track, that is all a slope that shows evidence of slump and slumps and instability.

Q. How long do you think that slope has been moving?

(Tr. p. 205)

What would be your estimation? A. Many, many years.

Q. Would you—how long would you expect it to continue moving? A. Equally long.

Q. Thank you. Do you have photographs, Dr. Ireland, that you feel depict the effect of this slope movement has had upon the Kalo line in this area? When I

speak of this area, I mean from the Illinois Central line down through the CNW line on the Fort Dodge, M. and St. L line? A. This photograph shows one location where the materials that are sliding downhill. This is Exhibit—Defendant's Exhibit S-7.

Q. Yes. A. These materials have crossed the ditch at the top of the balled section have encroached over the end of the ties and at the west rail or the track that is there currently as of last April. The berm at the rail is on the order of three to four feet thick where these materials have slid out over the track. There is one place where there is unquestioned indication that the slopes are unstable at this location. They are obviously moving with respect to the railroad alignment. In Defendant's Exhibit S-5, a photograph of some of the track again taken last April, there is evidence that the track is considerably

(Tr. p. 206)

out of proper alignment and it would appear that one rail is higher than the other, which is presumed to be a consequence of the slope movements.

Q. That's S-5. A. On Defendant's Exhibit S-16, the track is visible. Again, this photograph is looking toward the west and a few feet above the track is a light colored zone that represents a berm on that intermediate slope which undoubtedly is a consequence of slope movement at that location. This is going across here. And on Defendant's Exhibit S-12, there is visible a ponded area just beyond the track and above that ponded area a considerable number of slump blocks, again, evidence of slope instability.

Q. What is slump block? A. That's a block of material that has moved down a slope and has not completely broken up but leads to an irregular surface. The same type of thing is also indicated on Exhibit—Defendant's Exhibit S-20. I think those are reasonable examples.

Q. Now, do some of these pictures show the non-alignment of track? A. That's some subsequent activity that has nothing to do with this problem.

Q. Okay. A. This Exhibit S-1 shows the switch and it appears that this is a location where there has
(Tr. p. 207)
been a wash out. I am not in a position to say whether that was a culvert location or not. It may have been, but it's certainly wash out of the track on that location that has some responsibility for some of the misalignment that is visible there.

Q. Okay. What about the other misalignments? A. Well, there is some in the upper part of the photograph before the switch. This would be north of the switch that would appear to be perhaps of consequence of overall slope movement.

THE COURT: Counsel, which Exhibit is he referring to?

MR. JOHNSON: S-1.

• • •

MR. JOHNSON: Q. What about Exhibit S-6, Mr. Ireland?

THE WITNESS: A. This exhibit indicates that the east rail is materially lower in elevation that the west rail. This could be a consequence of movement of the uphill slope on the west side tending to raise that westerly rail or it might also be a consequence of some embankment instability causing the east rail to settle with respect to the west rail.

• • •

(Tr. p. 208)

• • •

THE COURT: Exhibits S-5, S-6, S-7, S-12, S-16 and S-20 are admitted.

MR. JOHNSON: Q. Dr. Ireland, on the basis of your expertise, on the basis of your inspection tour of this section of the railroad we have been talking about and that is depicted in part at least on the various exhibits that we have discussed so far, do you have an opinion on what has caused the misalignment, nonalignment of the tracks and the shifting in in the roadbed in this section of the line?

• • •

(Tr. p. 209)

• • •

THE WITNESS: A. Yes, sir.

• • •

MR. JOHNSON: Q. What is that opinion, Mr. Ireland?

• • •

(Tr. p. 211)

• • •

THE WITNESS: A. The shifting of the track is in my opinion due to several cause. For the most part I think this area was most likely unstable before the railroad was built in this location. And it has continued to be unstable in the intervening years. Undoubtedly some problems with the track have been a consequence of poor drainage at the track level, but compared to the total

(Tr. p. 212)

length of the trackage involved in the instability of this represents a small portion of their total problem.

MR. JOHNSON: What is the remainder of the problem, Dr. Ireland?

THE WITNESS: A. Well, the fact that the slopes are unstable and I have every reason to believe were unstable before the railroad was even built there.

• • •

MR. JOHNSON: Q. Dr. Ireland, would you explain to me what exactly is the scientific theoretical explanation that explains why the slopes are unstable, why they are

(Tr. p. 213)

moving into this direction, which is down?

THE WITNESS: A. This movement of a slope downhill is a consequence of the forces of gravity acting on a mass of material when on some potential movement surface there is inadequate strength to resist that movement.

Q. Is there—Is it fair to depict it as having an axis or pivot and that is a sort of a center of a circle and the slope is part of the circle and is tending to move down around the circle? A. For purposes of analysis, we frequently assume that the mass is moving on a cylindrical surface, about some center of that cylinder.

Q. Now, have you had experience in the past with railroad roadbeds that have had misalignment problems and shifting of the roadbeds due to slope movement?

A. Yes, sir.

Q. And have you made recommendations to railroads in the past on what they would need to do or what they should consider doing with regard to rehabilitating that slope to prevent slope movement? A. I have done that.

Q. On a number of occasions? A. Yes, sir.

Q. Now, on this occasion with respect to the Kalo line,

(Tr. p. 214)

Dr. Ireland, can you tell me what you think would be required in order to remove the problem of instability of this slope along that section of the Kalo line?

MR. BLACKBURN: Just a moment, Dr. Ireland. May I have a moment.

MR. JOHNSON: I am not asking him to testify as to the expense involved just to physically what he believes would be necessary to rehabilitate that slope. He is not going to testify to the cost involved.

MR. BLACKBURN: I think Mr. Johnson, in his opening statement, Your Honor, made a statement that it would cost $150,000.00 to rehabilitate this line. We asked in an interrogatory with regard to whatever studies have been made with regard to the costs and so forth and with regard to the repairs and that interrogatory was not answered and it was answered that no examinations or studies had been made.

• • •

(Tr. p. 216)

• • •

MR. JOHNSON: Q. Mr. Ireland, have you made any soil compaction or subterranean tests on the right of way in question following the embankment slide of

(Tr. p. 217)

1973?

THE WITNESS: A. No sir.

• • •

MR. JOHNSON: Q. Now, Mr. Ireland, would you please explain to me what course of action you would recommend if you were going to advise the railroad on what

they would have to do to remove this slope instability problem permanently?

THE WITNESS: A. In the first place—

MR. BLACKBURN: Let my objection stand to the answer.

* * *

THE WITNESS: A. In the first place, without considerable study, I am not certain it would be possible to make this area permanently stable. Normally in these type of slope stability problems, there are three choices of treatment to stabilize this mass of material that is rotating about some center. One is to put a counter balancing load at the bottom end of the part that is moving. If this happens to be the location of a stream or of a railroad, this obviously cannot be done. In some types of soils, (Tr. p. 218)

it is possible to increase the resistance to the movement by altering their strength characteristics. The information I have found in the geological literature and in this study made by the Highway Department suggests that these soils would not lend themselves to a change, an increased strength due to subterranean drainage, for instance. So the third alternative for trying to stabilize such a sliding mass is to remove some of the material from the upper part that is tending to cause the gravity rotation of movement. And that appears to me to be about the only possibility if one were to undertake a program of trying to stabilize the slides in this particular area.

Q. What would that entail in this particular case? A. Well, this I have not studied from the viewpoint of making such a recommendation, but it undoubtedly would require the excavation of a lot of material from the upper part of these slopes and perhaps a reshaping of the slopes.

Q. Would you characterize this as a major construction project? A. Considering that the instability is throughout the length of the alignment where it is close to the slopes, this would undoubtedly be a major project.

Q. If you were advising the railroad on rehabilitation
(Tr. p. 219)
of this line, would you advise them to give serious consideration to construction of a new line rather than attempting to rehabilitate this one? A. In my professional capacity, I could advise them on what I think might be required to attempt stabilization of existing slopes and perhaps suggest to them after they had priced this construction that an alternative might be to consider a new alignment. I would not recommend such an alignment.

Q. Pardon? A. I would not recommend the new alignment.

Q. Yeah. You would not have the—It would not be within your professional capacity to make that decision, is that correct? A. That's correct.

Q. But is it within your professional capacity to ask the railroad to consider that possibility if you think that it might be? A. I think—

Q. Might prove to be necessary? A. Excuse me, sir?

Q. Go ahead. A. I think any time a professional engineer makes a recommendation to a client, the client is under some obligation to evaluate that recommen-
(Tr. p. 220)
dation from the standpoint of his own purposes.

Q. Dr. Ireland, are the surveys that you have referred to, are they matters of public records?

* * *

(Tr. p. 226)

CROSS-EXAMINATION

BY MR. BLACKBURN:

* * *

Q. Well, I guess basically what we are getting at, if you are coming here to testify that this land has always had a tendency to shift and it had a tendency to shift since prior to the time that the road was built, is that a fair statement? A. Yes, sir.

Q. Then is it not an act of God, is it, to cause this road to shift?

MR. JOHNSON: Objection, Your Honor that's asking for a conclusion of law by this witness which he is not qualified to give.

• • •

MR. BLACKBURN: Q. Well, this isn't a sudden happening is it?

THE WITNESS: A. No, sir.

Q. It is something that would be expected over the years? A. It has been occurring over the years.

Q. Right. And something that could be guarded against by proper maintenance? A. I don't think so.

Q. Well, are you saying—I think you said that when you were out there that the water was impounded on the

(Tr. p. 232)

west side of the track? A. In places.

Q. And you said that had some effect on it? A. Undoubtedly.

Q. Right. Now, I think it might be important to discuss the difference between slope movement and track movement and there could be a difference, could there not? A. Yes, sir.

Q. And although there is slope movement over the years, the track movement could be of fairly recent duration, could it not? A. You could have an interrelationship, yes, sir.

Q. Now, my question is, although there is slope movement over the years, the track movement could be of fairly recent duration depending on a lot of other facts including track maintenance, couldn't it? A. Yes.

• • •

(Tr. p. 255)

R. J. CHRISTENSEN

• • •

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. Would you state your name and occupation, sir? A. R. J. Christensen. I am assistant division manager of engineering on the central division of the

Chicago and Northwestern Transportation Company.

* * *

Q. Have you had experience during your employment with the Northwestern with sliding slopes and the effect that that type of condition may have on railroad roadbeds? A. Yes, I have.

Q. Would you describe briefly, Mr. Christensen, the extent and nature of that experience that you have had? A. Well, we have always had in the twenty-eight years I have been around, we have had slides in various locations, some small, some big. I have

(Tr. p. 257)

had experience right here in Fort Dodge on the original line, the M and St. L line, that served the Kalo Brick and Tile. We had—in 1961 was the first time that this particular portion was part of my territory. We had a slide that took us out of service in four or five spots along the line and we then repaired those areas in '61.

Q. Mr. Christensen, when you refer to the old M and St. L line, on this Defendant's Exhibit W, are you referring to the line denoted the Chicago and Northwestern? A. Yes, I am.

Q. Thank you. A. Shown in red. At a later date in I believe it was 1966, in the spring of the year, we had a slide which took us out of service for I suppose six to seven months.

Q. What line are you referring now? A. This is still on the line, on the old M and St. L.

Q. Mr. Christensen, have you had experience on lines other than the old M and St. L and Des Moines, Fort Dodge and Southern? A. Yes, we have. I worked on a slide up in Wisconsin where we had to renew the embankment.

Q. Okay. You have had—you are familiar with the history of the Fort Dodge, Des Moines and Southern line near Fort Dodge and the old M and St. L line,

(Tr. p. 258)

is that correct? A. Yes.

Q. Have those lines had a long history of slope movement, clay slides? A. Yes, they have.

Q. * * * Is the type of terrain, soil conditions that is present in the Old M and St. L line substantially similar to the soil conditions and terrain that is present on the Fort Dodge, Des Moines and Southern line? A. Yes, it is.

Q. Would you explain to me the experience you had in the late '60's with a slope slide problem on the old M and St. L line, please? A. Well, in the spring of 1966 we had a slide and we did a lot of checking around. First of all we thought that we might take some soil test borings. But when I met the man from their consulting firm that do test work out of Ames—I can't tell you their name right now—we went over the line and he said that the cost could go as high as a hundred thousand dollars just to take the test borings on this line because of the location and the conditions in order to get proper tests to show what we wanted.

Q. And what do the test boring provide you with? (Tr. p. 259)

Does that tell you how to repair the problem? A. No, but the test borings would show us what kind of soil conditions we have, how deep we would have to go possibly to remove them or what water conditions we have in that area.

Q. Did you decide to have test borings made at that time? A. No, we did not.

Q. What did you do? A. We hired a contractor and we went in and we dug this area completely out. We dug down and keyed into the rock. Now, this was only the embankment of the railroad that we dug out and we brought in new fill and built the road up and put it in service, I believe, in the end of September of '66. The line held until March of 1967 and as soon as the frost went out of the ground in March, we lost the whole area again. It slid down the—the whole embankment slid into the river.

Q. After rehabilitation of the M and St. L line proved to be unsuccessful, did the railroad then begin using the old Fort Dodge, Des Moines and Southern line? A. Yes. It was very shortly after that that we started serving the remaining line down there with the Fort Dodge, Des Moines and Southern and the connection which we called Shady Oak which connected the Fort Dodge, Des Moines and Southern with the old M and St. L trackage.

(Tr. p. 260)

Q. And did the Fort Dodge, Des Moines and Southern line also have a history of sliding slopes? A. Yes, it did.

Q. Have you had a chance to review Exhibits S-6, S-7, S-16, S-5, S-12, S-1, S-20, which are photographs depicting portions of the Fort Dodge, Des Moines and Southern line, Mr. Christensen? A. Yes, I have.

Q. Were those pictures taken at your direction? A. Yes they were.

Q. Do those pictures depict a sliding slope movement that has adversely effected the railroad roadbed? A. Yes, they do. They show the embankment sliding down onto the railroad and also the embanking embankment sliding out from under the trackage.

Q. Now, does one of those pictures show what—well, when you—did you go on an inspection tour of this line? A. Yes, I did.

Q. When was that? A. Well, I have been on several of them.

Q. Did you go on one just prior to the taking of these pictures? A. Yes, I did, the day before.

Q. When was that? A. I don't have the exact date.

(Tr. p. 261)

Q. Was it in the spring of '76? A. Spring of this year, yes.

Q. Was a Dr. H. O. Ireland with you on that day? A. Yes.

Q. Did you notice—did you observe what appeared to be a washout at the northern junction of Shady Oak Transfer? A. Yes, I did.

Q. Do you see any picture in there, any photographs among those exhibits that may depict the area of that washout? A. Yes, Exhibit S-1.

Q. To what extent, Mr. Christensen, in your opinion on the basis of your experience in engineering, railroad engineering, did that washout effect the inability to move cars over this line? A. Well, the washout itself basically had no bearing on the removal of the line from service. The washout would have been very easy to repair had it not been for the other problems.

Q. You fixed washouts before? A. Many of them.

• • •

(Tr. p. 262)

Q. Mr. Christensen, if you were going to try to institute a permanent rehabilitation of the Fort Dodge, Des Moines and Southern line and remove this problem of slopes sliding down and adversely effecting the roadbed, could you or do you have an idea of what

(Tr. p. 263)

steps you might take to accomplish that attempted rehabilitation?

• • •

THE WITNESS: A. Yes.

MR. JOHNSON: Q. Would you please describe to me what steps you might recommend—

• • •

MR. JOHNSON: (Continuing) —if the decision has been made to go ahead and attempt to accomplish that rehabilitation?

MR. BLACKBURN: Plaintiff objects to that for the reason it is irrelevant to any issue respecting the railroad's liability in this case to furnish car service. It is irrelevant to what steps were to be made. The fact of what steps were to be made is irrelevant.

THE COURT: Overruled. You may answer.

THE WITNESS: A. In order to make a permanent repair to the track, I feel that we would have to go in

(Tr. p. 264)

and remove the high embankment adjacent to our track, first of all, and move them back a considerable distance from our track. We would then have to go in.

Q. Mr. Christensen, are these embankments located on the railroad right-of-way? A. Most of them are not.

Q. Would that involve acquisition of the property? A. Yes, it would, or either purchase or sloping rights to work on this property. It would also require some kind of purchase or agreement to be able to dispose of the dirt which was removed. We would then have—.

Q. Do you mean you would have to purchase land for the depositing of the removed dirt? A. Yes. We would then have to go into certain areas of our track subgrade.

Q. Would you have to have test borings? A. We should, yes, definitely, to tell us what areas we should go into and remove and to what extent and we would have to dig out the soils which are not stable and replace them with a good stable foundation.

Q. Such as you did on the M and St. L line? A. On the subgrade itself, yes.

Q. Have you had occasion to have railroad people perform a contract with outside contractors for the removal of the earth?

(Tr. p. 265)

A. Yes, I have.

Q. Have you had occasion to do that frequently in your experience or quite often? A. Quite often, yes.

Q. And have you had to dig down and attempt to rebuild roadbeds from rock or the first solid subterranean surface? A. Yes, we have.

Q. Mr. Christensen, on the basis of your experience in railroad engineering, and your knowledge of the particular problem with slope slides on the Fort Dodge, Des Moines and Southern line, do you have an opinion on what would be your most conservative minimum estimate of the cost to the railroad of the earth re-

moval, and rebuilding of the roadbed from the solid subterranean surface up on the Fort Dodge, Des Moines and Southern Railroad so that such work would be sufficient to permanently rehabilitate the line, if you feel that is possible?

MR. BLACKBURN: Yes or no answer.

THE WITNESS: A. Yes.

* * *

(Tr. p. 266)

MR. JOHNSON: Q. What is your opinion?

* * *

(Tr. p. 267)

THE WITNESS: A. Well, in my opinion, it would be in excess of a quarter of a million dollars to put this portion of the line back into operation that would be

(Tr. p. 268)

reliable.

* * *

MR. JOHNSON: Mr. Christensen, on the basis of your particular knowledge of this section of railroad line, that is, Fort Dodge, Des Moines and Southern, and your prior experience with attempting these types of slope rehabilitation and roadbed rehabilitation operations, do you have an opinion on the length of time that would be involved in attempting to shore up these type of construc-

(Tr. p. 269)

tion projects on the Fort Dodge, Des Moines and Southern line?

THE WITNESS: A. Yes.

MR. JOHNSON: Q. What is that opinion?

MR. BLACKBURN: Well, same objection as last urged. It is irrelevant to the pleaded issues.

THE COURT: Overruled. You may answer.

THE WITNESS: A. Due to the fact that we would have to obtain land and other items in there plus the dirt work and so forth, it would be a minimum of two years.

* * *

CROSS EXAMINATION

BY MR. BLACKBURN:

* * *

(Tr. p. 277)

Q. Do you know whether or not that water was impounded there prior to April 4th, 1973? A. It has been impounded at different times, but released to go through.

Q. I see. It was released to go through at different times. And that was with your knowledge and as division engineer? A. That's right.

Q. And when was it released in prior years? A. I wouldn't know the dates.

Q. Well, would it have been prior to April 4th, 1973? A. Yes, It had been cleaned out in the past.

Q. I see. When was the decision made not to clean it out? A. I don't really think I can say. I don't know.

Q. Well, at least sometime prior to 1973 you knew that water was being impounded on the west side of the track and somewhere a decision was made not to clean it out, is that what you are saying? A. No, prior to 1973 it was always cleaned out and drained out. To my knowledge whenever it built up, it was drained.

(Tr. p. 278)

Q. Tell the Court why it wasn't drained out in 1973? A. Because it was a minor part of the problem, the draining out would not have helped. It was the slides that were causing the line to go out of service.

Q. It seemed to be of sufficient problem the railroad took care of it prior to that time, did it not? A. We normally take care of our drainage on our roadbed.

* * *

Q. The fact is when this line was taken out of service in April of 1973 absolutely nothing was done by the Chicago and Northwestern Transportation Company? A. I can't answer that. I was not there. I do not know.

Q. But you have the records? A. Yes, I do.
Q. And have you looked at those records? A. No, sir.
Q. Pardon? A. No, sir.
Q. You haven't looked at those records? A. I have not checked in to see what was done.
Q. Now, you stated that—gave an opinion here that it would cost a number of dollars to put the line back in service and part of that was due to land acquisition. Did you go out and talk to any of the landowners there about the land acquisition? A. No, I did not.
Q. Did anybody from the Chicago and Northwestern Transportation Company? A. No, not to my knowledge.
Q. Did you retain any contractors to go out there and make any kind of studies at all?

(Tr. p. 285)

A. No, sir, again, not to my knowledge.
Q. Well, you would be the man to know if they were done, wouldn't you? A. Well, they could have been done in '73 and part of '74 before I did it, but to my knowledge, no.
Q. So far as you know then nobody from the Chicago and Northwestern Transportation Company made any attempt to find out what the land prices there were for acquisition? A. Not to my knowledge.
Q. But that's part of the basis upon which you make your estimate as to what it would cost to repair this? A. That's a portion of it, yes.

* * *

(Tr. p. 295)

REDIRECT EXAMINATION

BY MR. JOHNSON:

Q. Mr. Christensen, as a railroad engineer, do you have extensive experience in observing a set of rails and knowing by visual inspection whether those rails are safe for the operation of locomotive and cars? A. Yes, I have made many inspections.

Q. Are there circumstances or instances in which the eye of a trained railroad engineer looking at a set of tracks will pick out unsafe areas that the eye of a layman without extensive experience in that line of work might not notice? A. Certainly.

Q. And when you talk about slide problems on the Kalo —on the Fort Dodge, Des Moines and Southern line, are you talking about problems that have influenced the alignment of tracks or stability of roadbed to the extent that it might not be safe to pass a locomotive and cars over that rail? A. That is correct.

Q. And are there spots when you inspected the line—were there spots on the line which you noticed with your experience and trained observation that a layman might not realize present a safety hazard? A. Yes, there were.

• • •

JERRY KILIPER,

DIRECT EXAMINATION.

(Tr. p. 301, l. 22 *through* p. 302, l. 2)

• • •

Q. By April 18th the company had decided to go out of business, is that correct? A. That's what the letter says there.

Q. I am asking whether you recall this letter refreshes your recollection?

(Tr. p. 302)

A. If the letter—I wrote the letter and that's what the letter says. I would assume that's a correct statement.

• • •

JERRY SCHNURR,

DIRECT EXAMINATION.

(Tr. p. 318, ll. 11-16)

• • •

Q. At that time where were you after the landslide? You were no longer receiving cars at the—on the Kalo branch, were you? A. No, sir.

Q. You were receiving them from Fort Dodge? A. Yes, sir.

• • •

(Tr. p. 319, l. 3 to p. 320, l. 15)

* * *

Q. That was one of my other questions. A We continued to ship on into the fall to complete projects that were started, yes, sir.

Q. But, we don't have accurate records to show—
A. (Interjecting) I have no records after what is in that diary.

Q. So that up to the period ending April 30, 1978, we have an accurate record of cars you ordered at Kalo prior to the landslide and cars you ordered at the Fort Dodge to be placed at the Fort Dodge team track after the landslide? A. To the best of my recollection that would be correct.

Q. After April 30, you again were ordering cars and receiving cars at the Fort Dodge team track? A. Yes, sir.

Q. Did you receive those cars which you ordered to allow you to ship out all of your inventory of brick? A. I couldn't say that we shipped it all out by rail, no, sir.

Q. How was it all shipped out? A. Yes. We disposed of it, I believe.

Q. You did sell all of your brick? A. Basically in its entirety, yeah.

Q. You basically sold all of your brick inventory? A. Uh-huh (Yes).

(Tr. p. 320)

Q. And shipped it through some means? A. That's right.

Q. Did you— Did that brick—were you forced to take a lower price for that brick? A. That I can't answer. I don't—much of it had been prior—sold prior to the—much of the brick that we shipped after the landslide had been sold prior to the landslide and the price would not have deteriorated on it, no.

Q. So you were shipping to fulfill contracts that you already had? A. That's true.

Q. And certainly on those you were then receiving the same price for the brick? A. That is correct.

• • •

(Tr. p. 321, l. 17 to p. 322, l. 2)

• • •

Q. In other words, some of your shipping would have been local? A. Correct.

Q. And that wouldn't—you wouldn't have intended to ship that by rail anyway? A. No, sir.

Q. Basically, you shipped long haul rail and short haul truck? A. Basically we shipped the majority of our products by rail. The product that went to our distributor, the local product and the product within the

(Tr. p. 322)

State of Iowa, I could say would have been shipped by truck.

(Tr. p. 325)

• • •

MAURICE REID,

• • •

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. State your name, please? A. Maurice Reid.

Q. What is your present position with the Chicago and Northwestern Transportation Company? A. I am assistant chief engineer administration.

Q. Mr. Reid, would you please summarize to us your qualifications and experience in the field of railroad engineering? A. Yes, sir. I started to work on a part-time basis for the Chicago and Northwestern in 1935 and worked intermittently for them during the time I was in school. Until I graduated from Iowa State University in 1940 with a BS degree in civil engineering. At that time I returned to the Chicago and Northwestern and have worked for them full time since that date in—except for three years spent in the United States Army as an officer in the

(Tr. p. 326)

transportation corp and engineering corp, spending two years in India operating railroads. I served various positions in the engineernig corp of the railroad, such as rodman, instant man, assistant engineer, division engineer in charge of a particular division, meaning that I had responsibility for the maintenance of the track, bridges, and other fixed property on three different divisions of the railroad. I was then promoted to engineer maintenance way for the Chicago and Northwestern system and shortly thereafter I was made assistant chief engineer in charge of maintenance. At that time my responsibilities involved the fixed property of the entire Chicago and Northwestern system, which included tracks, bridges, buildings and such as that. In 1969 I was made assistant chief engineering administration and I have been in that position since that date.

Q. Are you a licensed engineer in any state, Mr. Reid? A. Yes, sir. I am a licensed professional engineer in the State of Iowa and the State of Minnesota. I belong to a number of societies, engineering societies.

• • •

(Tr. p. 330)

EXAMINATION FOR PURPOSES OF OBJECTION,

BY MR. BLACKBURN:

Q. As I understand it, Mr. Reid, we are talking about the repairs to the M and St. L line, is that correct? A. Yes, sir.

Q. And that was in what year? A. As I had indicated the last time that went out and was not repaired was in the spring of 1967.

Q. When was it that you went out there and inspected it? A. It was subsequent to that date, but I don't have the record of the dates I was out there. I have been out there at least twice since then.

Q. Did you make any subterranean studies at that time? A. No, sir, I did not.

Q. Did you make any cost estimates at that time? (Tr. p. 331)

A. No detailed cost estimate although viewing it on the ground.

Q. Well, my question is, did you make any cost estimate at that time? A. No detailed cost estimate in our opinion at the time when we were discussing on the ground.

Q. If you will just respond to the question and not volunteer. Now, did you retain any engineering firm to make any estimates at that time or to make any examination of that area? A. I did not and I am not sure whether—I don't believe our people in the field did either for total estimate.

Q. You would be the man who would know if they did, would you not? A. For a total estimate, yes.

* * *

(Tr. p. 332)

MR. JOHNSON: Q. Mr. Reid, is the ground in the area of the M and St. L still moving downhill?

* * *

THE WITNESS: A. In the area the time element (Tr. p. 333)

that I was there, it is in my opinion, it appeared to be moving downhill.

MR. JOHNSON: Q. Are the soil conditions and the topography, the geological makeup of the ground in the M—in the area of M and St. L line the same as the soil conditions, topography and geological makeup of the area of the ground from the—in the area of the Fort Dodge, Des Moines and Southern line?

THE WITNESS: A. Yes, in general, I would say they were. In other words, they are both on side hills.

Q. Pardon? A. They are both constructed, the track, on sidehills, type of terrain.

Q. What about the components of the soil? A. Well, of course, it is all laid with clay in the area.

Q. Was gypsum mining carried on near the slopes that were adjacent to the old M and St. L line? A. Yes, sir.

Q. Did you observe while you inspected that line that these mining activities had any effect one way or another on slope movement in the area? A. Well, in my opinion they certainly could have because it placed considerable overburden over the natural soil in that area and, of course, this could put additional load on the soil in the area itself.

(Tr. p. 334)

Q. Now, after the Northwestern began serving Kalo Brick and Tile Company on the old Fort Dodge, Des Moines and Southern line, did they have a slide problem in '73? A. Yes, sir.

Q. And was that in April of '73? A. Yes, sir.

Q. Did you have an opportunity to inspect the slide problems on that line subsequent to April of '73? A. Yes, sir, I did.

Q. Do you think, Mr. Reid, that the slide problems on the Fort Dodge, Des Moines and Southern line could be repaired so that there would be a reasonable likelihood that they would not reoccur within the next week or the next day or the next month?

* * *

THE COURT: You may answer that yes or no.

(Tr. p. 335)

* * *

THE WITNESS: A. Yes, sir.

* * *

(Tr. p. 336)

* * *

MR. JOHNSON: Q. Okay. Mr. Reid, the Kalo line became impassable in 1973. Do you have an opinion on the basis of your observation of the line and on the basis of your experience as a railroad engineer concerning the

(Tr. p. 337)

cause of the problems with the roadbed that made the roadbed impassable? Yes or no.

THE WITNESS: A. Yes.

Q. What is that opinion? A. Well, the unstable soil condition which caused movement of soil that supposedly would support the track embankment and in

permitting the track to settle and move out of alignment.

Q. Is the unstable soil condition you are speaking about gravitational pull upon parts of the—upon the slopes or are you talking about slide movement or exactly what are you speaking about when you talk about unstable soil conditions? A. Well, we are talking about soil that has some pressure imposed upon it from above and laterally causing the soil itself to move.

Q. Have there been gypsum mining activities immediately west of the slope on the west side of the Fort Dodge, Des Moines and Southern line? A. Yes, sir, there have been.

Q. And have those mining activities had any effect, in your opinion, on the slope movement observable there? A. Well, I think the soil being generally unstable could have moved whether the mining activities were there or not. I think the mining activities could contribute to the movement of this soil and on this basis,

(Tr. p. 338)

yes, they could contribute somewhat to it by placing some overburden and also their method of excavation and so on.

Q. Mr. Reid, this is exhibit—Defendant's Exhibit W. This is the United States Department of Interior geological contour map which shows elevations of terrain. By reading that map can you tell the Court what that map indicates with regard to differing levels of elevation between the flow line of Gypsum Creek and the Fort Dodge, Des Moines and Southern roadbed? A. Well, in the near vicinity of the interchange track or the switch along the Fort Dodge, Des Moines and Southern, the flow line of the Gypsum Creek is from 30 to 40 feet below the track and the hill to the west approximates about 80 feet above the track.

Q. Okay. Thank you. Now, what area of the line were you talking about just then? A. This is trackage in the area of the switch leaving the Fort Dodge,

Des Moines and Southern track and interchanging with the M and St. L track. The point at where it left the—and connect with the Fort Dodge, Des Moines and Southern track.

Q. Mr. Reid, would you tell me again when you visited the Fort Dodge, Des Moines and Southern track and observed the slide areas? A. Well, I was in the

(Tr. p. 339)

areas as I mentioned in 1975.

Q. What time in 1975? A. September the 30th. I was also in this area this summer.

Q. Okay. Were you out there this morning? A. Yes, sir, I walked out there this morning.

Q. Now, if you were going to try to repair that line as I was talking about earlier, make repairs that would be of more than a temporary nature, what types of repair would you institute or recommend, if any? A. I would recommend that the entire slope to the west of the track or the hill to the west be partly removed so that you would have a much flatter slope from the track open area up to the higher elevations to the west. I would also recommend removing some of the material that the track sets on at this time and wasted and then bring in more suitable material for building a grade at that point.

Q. Are you familiar with the cost of performing these types of activity? A. The exact cost of this, I have not been involved in in recent—last few years. We have done similar things in years past.

Q. Okay. Would the lapse of time between April of '73 and your first outside inspection of the Fort Dodge, Des Moines and Southern line had made any substan-

(Tr. p. 340)

tial difference in the cost of instituting the types of repairs that you are talking about? A. No, not on the type of repair that would be somewhat permanent or what we consider or hope to be permanent.

Q. So even if the slide actions might have increased to some extent in that interim period, you are still faced with the same types of repairs, is that correct? A. Yes, sir.

Q. Now, Mr. Reid, I want you to assume that the cost of repairing—well, strike that. Mr. Reid, on the basis of your experience as a railroad engineer, and on the basis of your observations of the Fort Dodge, Des Moines and Southern line, do you have an opinion on what the cost of repair of making repairs which would have more than just a temporary nature would be to repair the slide problems as you observed them on your 1975 on site inspection?

MR. BLACKBURN: Yes or no.

* * *

(Tr. p. 341)

THE WITNESS: A. Yes, but only in general.

MR. JOHNSON: Q. And what is your opinion? * * *

MR. BLACKBURN: Object to that as being irrelevant and immaterial, remote in point of time. The witness is not qualified to answer the question and any answer would simply be led to conjecture and surmise based upon the record that's been made.

THE COURT: * * * The Court will permit the answer. The objection going to weight. You may answer.

THE WITNESS: A. Well, it would be well into six figures, but as I indicated, I have not—we have not made a detailed survey or taken estimate on the details of the cost, but just from experience of this type, it would be well into six figures.

MR. JOHNSON: Q. Do you have an opinion, Mr. Reid, on the highest amount that such repairs could run?

MR. BLACKBURN: Same objection.

MR. JOHNSON: Yes or no.

* * * (Tr. p. 342)

detailed cost studies made because of the expense involved, but I would like to know whether or not you can give us a range. I just need a yes or no answer on whether or not you have an opinion on the range of cost we might be talking about?

* * *

MR. JOHNSON: Q. And what is that opinion? * * *

MR. BLACKBURN: Same objection as last urged.

THE COURT: Same ruling. You may answer.

THE WITNESS: A. It would range in the neighborhood of all the way from half a million dollars up to two million dollars.

• • •

(Tr. p. 349)

CROSS-EXAMINATION

BY MR. BLACKBURN:

Q. Right. Now, in your experience as a railroad engineer and your experience in maintenance, would you agree with me that it is not good maintenance practice to permit water to stand on the side of the track for an extended period of time? A. It is not good maintenance practice to do that.

• • •

(Tr. p. 358)

Q. Isn't it true that the Chicago and Northwestern Transportation Company never intended to make any repairs to the Shady Oak Transfer? A. At what point in time are you speaking of?

Q. In April of 1973 or at any time subsequent to that? A. We made no decision to that effect at that time, no, sir.

Q. My question is, they never ever intended to make any repairs to that, isn't that true?

• • •

THE WITNESS: A. We had never made a decision not to make the repairs.

MR. BLACKBURN: Q. You never made any esti-

(Tr. p. 359)

mate of the cost at that time? I am talking about April or at any time during 1973. There was no estimate of cost made, were there?

THE WITNESS: A. There was no detailed estimate of cost made.

Q. Precisely. No studies were made, were there? A. By studies, if you mean soundings and all of that at that time, no.

Q. In fact, you didn't even go out there until September of 1975, did you? A. That would not have been my job to have done that, sir.

Q. Well, you did go out there in September of 1975 to make the—why did you go out there in September of '75? A. I went out in September of '75 at that time to gather data and so on in connection with the proposed filing for abandonment?

• • •

(Tr. p. 360)

• • •

MR. BLACKBURN: Q. The point I am making, there was never any intention by the Chicago and North Western to repair this track no matter what it cost in 1973, was there?

THE WITNESS: A. No, I couldn't agree with that statement, sir.

Q. Well, no cost estimates were made, were there? A. No, sir, but that doesn't mean we decided not to repair it.

• • •

(Tr. p. 361)

Q. And insofar as any relief for Kalo Brick and Tile Company, the railroad just ignored the problem, did it not?

• • •

(Tr. p. 362)

• • •

MR. BLACKBURN: I will add to that insofar as the repair of this 150 foot section of track was concerned?

THE WITNESS: A. I don't know as they ignored the problem, but they did not make repairs to this track.

Q. And they made no studies. Isn't that really the substance of your testimony? A. They made no detailed studies.

Q. And they made no cost estimates? A. Only general cost estimates?

• • •

(Tr. p. 365)

RAYMOND E. SNYDER

• • •

DIRECT EXAMINATION

BY MR. JOHNSON:

Q. State your name, please? A. Raymond E. Snyder.

Q. What is your present position with the Chicago and Northwestern Transportation Company? A. I am the director of the maintenance operations.

Q. Were you the assistant division manager of engineering with supervisory responsibilities for the Fort Dodge, old Fort Dodge, Des Moines and Southern line during April of 1973? A. Yes, I was.

Q. When did you assume that jurisdiction? A. The territory was transferred to me from the Iowa division in January of 1973.

Q. Are you familiar, Mr. Snyder, with a problem that occurred in the roadbed in April of 1973? A. Yes, I am.

Q. What was the nature of that problem? A. We had slide conditions that developed in the early part of '73 in March and in April, and in early April they became or they extended to the extent that we could no longer maintain safe rail passage over the trackage.

(Tr. p. 366)

Q. Do you know what day in April that was? A. I believe it was April the 4th.

Q. Of 1973? A. Of 1973.

Q. Did you personally inspect that line of railroad? A. Yes, I did.

Q. Approximately when did you make your first inspection tour? A. Between April 4th and April 15th, sometime in that area.

Q. And did you communicate with any of your superiors after that? A. Yes. I talked first on the phone with the assistant vice-president of engineering and then followed that phone conversation up with a letter. Subsequent to that I returned to the area with the division manager.

Q. About when was that, Mr. Snyder? A. That would have been between the 15th of April and the 24th or 25th of April.

Q. You returned with the division manager? A. Yes.
Q. Who was that? A. Mr. George Hansen. At that time we examined it, the area, and agreed that it would be impossible to continue train operations over the trackage as it was.
Q. Now, had that line been taken out of service prior to
(Tr. p. 367)
your first inspection tour? A. Yes, it had been taken out of service by the roadmaster, Mr. Ray Burks.
Q. Why was it taken out of service by Mr. Burks? A. Because he wasn't able to stabilize the alignment of the track.
Q. Were the tracks impassable? A. That's right.
Q. What did you advise—Well, excuse me. Strike that. Your experience with the railroad has been in the engineering department? A. That's correct.
Q. Is that correct. In—and your present position is what? A. Director of maintenance operations.
Q. And that's in the home office in Chicago? A. That's correct.
Q. Have you had experience in maintenance of roadbeds and repair of roadbed problems? A. Yes, I have.
Q. When you inspected this line on the two occasions in April of '73, how did you advise your superiors concerning the possibility of repair of the roadbed problems? A. Well, I advised them of the extent of the slide condition relative to the switch as well as relative to the trackage, the old interchange with the M and St. L and I also advised that I
(Tr. p. 368)
felt that soil samplings would be necessary to determine the extent of work necessary to put the line back in service.
Q. And what was the nature of the information that you conveyed to them? A. Well, that the cost of putting the line back in service would be in the six figure area.

• • •

III. DEPOSITION OF RAYMOND BURKS

(Depo. Tr. p. 2)

* * *

DIRECT EXAMINATION

BY MR. BLACKBURN:

Q. Your name is Raymond Burks?

A. Yes.

* * *

Q. Are you still employed by the Chicago and North Western Transportation Company?

A. Yes.

Q. What are your present duties?

A. I am a roadmaster.

(Depo. Tr. p. 3)

Q. What does a roadmaster do?

A. He is in charge of track maintenance.

* * *

Q. Prior to that time, you were stationed at Fort Dodge, Iowa, is that correct?

A. Yes.

Q. Were you roadmaster there at Fort Dodge?

A. Yes.

Q. How long were you roadmaster at Fort Dodge?

A. About four years.

Q. Did you have the same duties at Fort Dodge that you have now?

A. Yes.

Q. In charge of track maintenance?

A. Yes.

Q. And that includes track repair, is that correct?

A. Yes.

* * *

(Depo. Tr. p. 4)

* * *

Q. (By Mr Blackburn) Who would have the records at the present time of track maintenance and repair for the period of time, say, from 1965 until 1973?

(Depo. Tr. p. 5)

A. It would be either one of two places. It would be Mason City or Boone.

Q. I see. Would those records include all orders for the repair and maintenance of track and right of way?

A. I really don't know if they would include all of them or not.

Q. I see. Well, are there—In your duties as roadmaster, would you receive written orders to repair before your undertook an extensive repair, ordinarily?

A. Ordinarily, in extensive costly projects, yes.

Q. And you would receive those from the division engineer, ordinarily?

A. Yes.

* * *

(Depo. Tr. p. 6)

Q. As roadmaster, did your duties include a periodic inspection of the track on the Kalo line?

A. Yes; as warranted, yes.

Q. How often would you make an inspection down there, roughly?

A. Probably twice a year, at the most.

Q. I see. Would that be between the period of time, say, from approximately—well, I guess during the four years that you were there, is that correct? Approximately twice a year for the four years that you were there, do you think?

A. No. Actually, on this particular line, I inspected it in April.

Q. April of what year?

A. That would have been '73.

Q. Did you ever inspect it before that time?

(Depo. Tr. p. 7)

A. No.

Q. Had you ever gone down on that stretch of line at any time prior to April of 1973?

A. Yes, I have.

Q. Do you remember the approximate times you went down there, by date?

A. Not by date, but it was in the fall of '72.

Q. In the fall of '72. What caused you to go down there on that occasion?
A. At that time, there was another gentleman that wanted to see the line, and we took a rail trip down.
Q. Who was that?
A. It was Mr. Gathman.
Q. Who is he?
A. He was a roadmaster.
* * *
Q. But you and Mr. Gathman went down in the fall of '72, is that correct?
A. Yes.
Q. At his request?
(Depo. Tr. p. 8)
A. Mutually.
Q. I see. What did you go down for?
A. He just wanted to show me some of the line, is all, and to just acquaint myself with it.
Q. When did you first come to Fort Dodge?
A. It was in March of '70.
Q. So from March of 1970 until the fall of '72, you hadn't seen this particular stretch of line?
A. That's correct.
Q. Was there any particular reason, other than Mr. Gathman wanting to show you that stretch of line, that you went down there? Was there a specific purpose in that?
A. At that particular time, it—I just wanted to see the railroad, and he wanted to go down it also.
* * *
Q. So from 1970 until the fall of 1972, you had not seen that particular stretch of line, and it didn't cause any particular problems? Is that basically correct?
A. Not to me.
Q. You mean it didn't cause any particular problems to you?
A. As a roadmaster, it did not?
Q. Was there anybody else that reported to you as
(Depo. Tr. p. 9)

roadmaster? The section foreman, and so forth, did they report to you?

A. Yes, they did.

* * *

Q. Now, getting down to the spring of 1973, is that the time that you recall that the service was discontinued to the Kalo Brick and Tile Company?

A. Yes.

Q. Would that have about April of '73 some time?

A. Yes.

Q. Did you have anything to do with that decision to discontinue service?

A. Yes.

Q. Can you explain to me how you were involved in that decision?

A. My foreman had discovered a crevice developing along (Depo. Tr. p. 10)
this line indicating a slack, of which he called to my attention, and we did inspect this, and at that time took the line out of service.

Q. Now, that was your foreman, Rex Parks?

A. Yes.

Q. What kind of a crevice was it?

A. It was just an opening that ran along where the bank came down, between the bank and the railroad, for approximately 150 foot.

Q. Was it cross-sectional to the railroad, or did it run with the railroad?

A. It was running parallel with the railroad.

Q. I see. This was in the spring of 1973, is that correct?

A. Yes.

Q. Was there any water impounded on the west side of the track at that time?

A. There was, yes.

Q. And that is about the place in the track where the crevice appeared? Is that substantially correct?

A. The crevice ran down near that area, yes.

Q. I see. Well, let me ask this question. Were there any blueprints of that track available to you when you were roadmaster there?

A. I had none, but I suppose they were available.
(Depo. Tr. p. 11)
Q. I see. Have you ever at any time before or since ever seen any blueprints of the track or plans of the —drawings of the track?
A. Yes.
Q. You have seen them since this time, is that what you are telling me, since April of '73?
A. Yes, I have.
* * *
Q. Do you recall when you looked at those blueprints whether or not there was a culvert under that railroad at the point where the water was impounded?
A. I don't recall seeing it on the prints, no, but—
Q. Did you have personal knowledge that there was a culvert there?
A. I was told there was one there, yes.
Q. Who told you that there was a culvert at that point?
A. It was either Jerry—one of the Jerrys at Kalo Brick and Tile.
Q. Either Jerry Schnurr or Jerry Kiliper would have told you that there was a culvert at that point?
A. Yes.
Q. Did they tell you this about the culvert prior to April of '73?
(Depo. Tr. p. 12)
A. No.
Q. I see. Now, was there some kind of an engineering study made about that time with respect to that—whether or not that was repairable?
A. I think there was one made.
Q. An engineering study?
A. I believe so.
Q. Do you know who made that?
A. I would imagine it would be Mr. Snyder's office.
Q. You went down there, did you not, with Jerry Kiliper and Jerry Schnurr at about that time, and I am talking in probably the second week of April of '73, somewhere between the 10th and 20th?
A. Yes.

Q. And you think there was an engineering firm who came out and made a study of it, is that your testimony?
A. I'm just not sure.
Q. I see. Well, if Ron Gibbons advised the people from Kalo that they had hired an engineering firm to look at the slide area, would that be substantially true?
A. I recall that they had contacted someone.
Q. But you don't know who the engineering firm was?
A. No, I don't.
* * *
(Depo. Tr. p. 13)
Q. A little bit ago, I think you—now, I might be misquoting you, and if I am, you correct me—but did you recommend that the line be taken out of service?
A. Yes.
Q. And you did this, I take it, without seeing this engineering report, if one was made?
A. Yes.
Q. This was a decision that you yourself made, is that correct?
A. Yes.
Q. Did you discuss it with anyone, any of your superiors?
A. After I made the decision, yes.
Q. Who did you discuss it with?
A. With Mr. Snyder.
Q. Would you tell me what the substance of that con-
(Depo. Tr. p. 14)
versation was, as best you can remember?
A. Yes. Mr. Snyder came to Fort Dodge and surveyed the line himself.
Q. Do you remember when that was? This was after you decided to take it out of service, I take it?
A. Yes. I would say within a week.
* * *
Q. Did you—I guess my previous question was—which you did not answer—would you tell me what the substance of that conversation was?
A. At that time, he agreed with me, due to the area that was involved, that until a study could be made, that was the feasible route to take.

Q. I see. Until a study could be made, and then was a subsequent study made?
A. I don't know.
Q. I see. At that time, what was the approximate distance that the track was impassable, and I am talking about the time, say, April 19, 1973?
A. I would guess about 300, 350 foot of it.
Q. When I asked you about an engineering study, you said that your recollection was that one was made.
A. We talked about it that day, that they would make one.
Q. I see. You don't have any recollection as to who made
(Depo. Tr. p. 15)
the study?
A. No.
Q. Do you know whether or not any soil samples were taken?
A. No, I do not.
Q. At least you weren't present there when any were taken, if there were any taken?
A. That's correct.
• • •

GAMBLE, RIEPE, BURT, WEBSTER & DAVIS
By /s/ J. D. Polson
James D. Polson
By /s/ Bruce E. Johnson
Bruce E. Johnson
2600 Ruan Center
Des Moines, Iowa 50309
(515) 243-6251
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Des Moines, Iowa, on the ....th day of ....., 1980.

/s/ B. Johnson

Supreme Court, U. S.
FILED
APR 23 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

No. 79-1336

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,
Petitioner,

vs.

KALO BRICK & TILE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF IN OPPOSITION

M. GENE BLACKBURN
NED ALAN STOCKDALE
142 North 9th Street
Fort Dodge, Iowa 50501
515/576-2171
Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

INDEX

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. The Iowa Supreme Court Decision Correctly Held That a State Court Has Concurrent Jurisdiction of Claims Against a Rail Carrier for Negligence, Failure to Provide Car Service, and Tortious Interference As They Are Cumulative Remedies Arising Out of State Law Expressly Preserved by the Interstate Commerce Act 5

II. The Omission by the Iowa Supreme Court of Issue Preclusion As a Ground of Decision Does Not Raise a Federal Question Reviewable Under 28 U.S.C. §1257(3) 8

III. The Iowa Supreme Court Decision That the Doctrine of Primary Jurisdiction Did Not Apply to Kalo's State Law Claim Was Based Upon Established Principles 10

CONCLUSION 13

Citations

CASES

B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 286 (Iowa 1976) 9

Baird Bros. v. Minneapolis & St. Louis R.R., 181 Ia. 1104, 169 N.W. 412 (1917) 6

Bayer v. Associated Underwriters, Inc., 402 S.W.2d 11, 13 (Mo. App. 1966) 9

Bertran v. Glens Falls Ins. Co., 232 N.W.2d 527 (Iowa 1975) 9

Bickford v. American Interinsurance Exchange, 224 N.W.2d 450, 455 (Iowa 1974) 9

Chicago, Rock Island & Pacific Rail. Co. v. Linwood Stone Products Co., 258 Ia. 1378, 138 N.W.2d 902 (1965) 6
Commissioner v. Sunnan, 333 U.S. 591, 598 (1948) 9
DeCanas v. Bica, 424 U.S. 351, 357-358, 361 (1976) 7, 8
Durley v. Mayo, 251 U.S. 277 (1956) 8
Eastern R.R. v. Littlefield, 237 U.S. 140, 143 (1915) 6
Far East Conference v. United States, 342 U.S. 370 (1952) 10, 11
Florida Avocado Growers v. Paul, 373 U.S. 132, 141-142 (1963) 8, 11
Great Northern R. Co. v. Merchants Elevator Co., 259 U.S. 285, 291 (1922) 11, 12
Humphrey Feed & Grain v. Union Pacific Rail. Co., 257 N.W.2d 391, 400 (Neb. 1977) 6
I.C.C. v. Baltimore & A. R.R., 398 F. Supp. 454, 466 (D. Md. 1975), Aff'd 537 F.2d 77 (4th Cir. 1976), Cert. denied 429 U.S. 859 (1976) 5
Illinois Central R.R. v. Mulberry Hill Coal Co., 283 U.S. 275 (1915) 6, 7
Johnson v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 400 F.2d 968 (9th Cir. 1968) 5, 6, 8
Lynch v. People, ex rel. Pierson, 293 U.S. 52 (1934) 8
Matter of Evans, 267 N.W.2d 48 (Iowa 1978) 9
Missouri Pacific R.R. Co. v. Stroud, 267 U.S. 404, 407-408 (1925) 7
Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 663-664 (1961) 7
Parklane Hosiery v. Shore, 439 U.S. 322, 58 L.Ed.2d 552, 561, 562 (1979) 10
Pennsylvania Railroad Co. v. Puritan Coal Mining Co., 237 U.S. 121, 127-133 (1915) 5, 6, 7

Pennsylvania Railroad Co. v. Sonman Shaft Coal Co., 242 U.S. 120, 123-125 (1916) 6, 7
Powell v. United States, 300 U.S. 276, 287 (1937) 7
Schneberger v. United States Fidelity & Guaranty Co., 213 N.W.2d 913, 917 (Iowa 1973) 8-9
Southern Pacific Co. v. Arizona, 325 U.S. 761, 767, 769, 770 (1945) 7, 8
State v. Stergion, 248 N.W.2d 911, 913 (Iowa 1976) 9
State Public Utilities Commission v. Baltimore & Ohio Southwestern R.R., 181 Ill. 403, 413, 118 N.E.2d 81, 84 (1917) 6
United States v. New River Co., 265 U.S. 533, 541-542 (1923) 7
United States v. Western Pacific R.R. Co., 352 U.S. 59, 65 (1956) 11, 12
Zucht v. King, 260 U.S. 174 (1922) 5

CONSTITUTIONAL PROVISIONS AND STATUTES

Interstate Commerce Act
49 U.S.C. §10103 ..... 3, 5, 6, 7, 8, 10, 12
49 U.S.C. §11101 5
49 U.S.C. §11121 7
49 U.S.C. §11121(a) 5
28 U.S.C. §1257(3) 8, 10

Code of Iowa, 1973
§479.3 ..... 2, 5
§479.122 ..... 2, 5

Constitution of the United States, Article VI, Clause 2 ("Supremacy Clause") 10

In the Supreme Court of the United States

No. 79-1336

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,
Petitioner,

vs.

KALO BRICK & TILE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This action arises out of the Chicago, North Western Transportation Company's ("CNW") negligent failure to maintain its branch line to the plant of Kalo Brick & Tile Company ("Kalo").

On September 13, 1974, Kalo filed its Petition in the Iowa District Court for Webster County. Kalo's Amended Petition alleged that because of the CNW's failure to use

reasonable care in maintaining its branch line track, the branch line became unserviceable on April 4, 1973, which in turn forced Kalo to close its business to its resulting detriment.

Kalo's claim of actionable negligence was based upon the CNW's common law duties made actionable by §479.122, Iowa Code 1973; and its duty to furnish suitable car service pursuant to §479.3, Iowa Code 1973. Kalo also alleged common law tortious interference with contractual relationships.

The CNW answered that:

(1) Its application to the Interstate Commerce Commission (ICC), filed November 14, 1973, for a Certificate of Public Convenience and Necessity permitting abandonment of the Kalo branch line preempted Kalo's right to litigate similar factual issues in a state court action because Kalo had participated in the ICC proceedings;

(2) Kalo's sole remedies were either to participate in the abandonment proceedings before the ICC pursuant to 49 U.S.C.A. §§1(18) and 1(19) or a suit for injunction pursuant to 49 U.S.C.A. §1(20).

On April 30, 1976, the Commission entered an Order permitting abandonment, but only after a Certificate of Abandonment was subsequently issued.

In its Findings of Fact, Conclusions of Law and Judgment filed July 29, 1977, the trial court dismissed all of Kalo's claims for want of subject matter jurisdiction finding that:

(1) Kalo's claim was one for wrongful abandonment rather than one for failure to provide car service, and as a consequence Kalo's exclusive remedy was in Federal

court or before the ICC which had primary jurisdiction in either case;

(2) As a concomitant of the ICC's primary jurisdiction, Kalo's participation in the abandonment proceedings collaterally estopped it from relitigating issues adversely determined by the ICC.

The Iowa Court of Appeals reversed and remanded for a new trial holding that:

(1) By virtue of 49 U.S.C. §10103 the state court had concurrent jurisdiction, as remedy provided by Iowa law was not inconsistent with the remedies contained in the Interstate Commerce Act;

(2) Kalo's claim did not raise issues requiring the exercise of administrative discretion but rather issues of fact within the conventional experience of judges and as a result the doctrine of primary jurisdiction was not applicable.

On November 30, 1979, the Iowa Supreme Court, *en banc,* overruled and denied the Chicago North Western's Application for Further Review.

The facts of the case are as follows:

For in excess of 50 years, Kalo relied upon the CNW and its predecessors in interest as its primary and principal source of transportation for its clay tile products. Kalo was initially serviced by the Minneapolis and St. Louis Railroad which provided suitable car service until it was acquired by the Chicago North Western Transportation Company in 1960. After the CNW took over the branch line serving the Kalo plant, service began to deteriorate. Beginning in 1961 and continuing into 1967, the branch line serving the Kalo plant was intermittently out of service due to earth slides which damaged the tracks

serving the Kalo plant. In 1967, the Chicago North Western leased and agreed to maintain a portion of the Fort Dodge, Des Moines and Southern Railway track which provided alternate access to the Kalo plant.

In March of 1973, ponded water was discovered around a portion of the CNW's leased track contrary to sound maintenance practice. During the first few days of April 1973, earth slides occurred along the leased track and other slides were developing because of improper maintenance procedures.

On April 4, 1973, the Chicago North Western notified Kalo that it could no longer provide cars at the Kalo plant because of the condition of the track and roadbed.

Without rail service, Kalo was unable to compete in the clay products market due to the substantially higher cost of transporting their product by motor freight. As a result, Kalo notified its customers on April 18, 1973, that it was going out of business after honoring existing contracts.

On November 14, 1973, after Kalo had stopped production, sold its inventory and otherwise disposed of its assets, the CNW applied to the Interstate Commerce Commission for permission to abandon its line to Kalo based partially on the fact that the Kalo plant no longer existed. On April 30, 1976, an Order was filed by the Commissioner permitting abandonment but only after the effective date of the certificate of abandonment subsequently issued.

REASONS FOR DENYING THE WRIT

I.

The Iowa Supreme Court Decision Correctly Held That A State Court Has Concurrent Jurisdiction Of Claims Against A Rail Carrier For Negligence, Failure To Provide Car Service, And Tortious Interference As They Are Cumulative Remedies Arising Out Of State Law Expressly Preserved By The Interstate Commerce Act.

The CNW asserts that a state court's jurisdiction over a rail carrier for damage claims based upon negligence,[1] failure to provide car service,[2] and tortious interference has been preempted by the Interstate Commerce Act. 49 U.S.C. §1 *et seq.* The federal question presented by the CNW is not substantial as it has been settled by prior decisions of this Court. *Zucht v. King*, 260 U.S. 174 (1922).

The CNW characterizes Kalo's claims as ones for wrongful abandonment or failure to provide car service.[3] However characterized, the issue presented for review does not generate a substantial federal question because: (1) The remedies created by the Interstate Commerce Act are cumulative and do not exclude or otherwise preempt a litigant's express right to pursue other remedies in state law actions pursuant to 49 U.S.C. §10103; *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 127-133

---

1. §479.122, Iowa Code 1973.

2. §479.3, Iowa Code 1973.

3. The duty to provide car service set forth at 49 U.S.C. §§11101 and 11121(a) and §479.3, Iowa Code 1973 are declaratory of the common law. See *I.C.C. v. Baltimore & A. R.R.*, 398 F. Supp. 454, 466 (D. Md. 1975), Aff'd 537 F.2d 77 (4th Cir. 1976), Cert. denied 429 U.S. 859 (1976); *Johnson v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 400 F.2d 968 (9th Cir. 1968).

(1915);[4] (2) Kalo's election to sue on state law theories was not inconsistent with federal regulation of branch line abandonments or the provision of car service. *Pennsylvania Railroad Co. v. Sonman Shaft Coal Co.*, 242 U.S. 120, 124 (1916).

The Iowa Supreme Court[5] held that the trial court had concurrent jurisdiction of Kalo's damage claims as a cumulative remedy expressly preserved by Section 22 of the Interstate Commerce Act,[6] which provided in part:

> ". . . Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies; . . ."

As a result, the Iowa court found concurrent jurisdiction with the federal courts following *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 132 (1915); *Eastern R.R. v. Littlefield*, 237 U.S. 140, 143 (1915); *Pennsylvania R.R. v. Sonman Shaft Coal Co.*, 242 U.S. 120, 123-125 (1916); *Illinois Central R.R. v. Mulberry Hill Coal Co.*, 283 U.S. 275 (1915).[7]

---

4. See, *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 663-664 (1961).

5. The Iowa Supreme Court, en banc, denied, without written opinion, Petitioner's Application for Further Review. References in the body of the argument to the Iowa court or to the Iowa Supreme Court refer to the written opinion of the Iowa Court of Appeals.

6. The Interstate Commerce Act was revised without substantive change in 1978. Act of Oct. 17, 1978, Pub. L. 95-473, §1, 92 Stat. 1337. Section 22 was revised and codified and now appears as 49 U.S.C. §10103 which provides: "Remedies as Cumulative—The remedies provided under this sub-title are in addition to remedies existing under another law or at common law."

7. *Johnson v. Chicago, Milwaukee, St. Paul & Pacific Rail Co.*, 400 F.2d 968 (9th Cir. 1968); *Humphrey Feed & Grain v. Union Pacific Rail Co.*, 257 N.W.2d 391, 400 (Neb. 1977); *Chicago, Rock Island & Pacific Rail Co. v. Linwood Stone Products Co.*, 258 Ia. 1378, 138 N.W.2d 902 (1965); *Baird Bros. v. Minneapolis & St. Louis R.R.*, 181 Ia. 1104, 169 N.W. 412 (1917); *State Public Utilities Commission v. Baltimore & Ohio Southwestern R.R.*, 181 Ill. 403, 413, 118 N.E.2d 81, 84 (1917).

The Iowa court's decision is consistent with the principle that the question of preemption is determined by the manifested intent of Congress, here demonstrated by the reservation of remedies in 49 U.S.C. §10103. *DeCanas v. Bica*, 424 U.S. 351, 361 (1976). *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

The CNW seeks to distinguish the *Puritan Coal*, *Mulberry Hill*, and *Sonman Shaft* cases because they predated the Esch Car Service Act and the Transportation Act of 1920, which gave the Commission excusive *regulatory* jurisdiction over the provision of car service and railroad line abandonment.[8] The Iowa Court clearly conceded the regulatory supremacy of the Interstate Commerce Commission in matters involving interstate transportation. Notwithstanding the regulatory supremacy of the Interstate Commerce Commission, the Iowa court properly found that Kalo's claim was simply not a case involving state regulation of interstate commerce, nor was Kalo's claim otherwise based upon federal law.[9] The CNW contends, however, that a state court's concurrent jurisdiction over damage claims for negligence amounts to de facto regulation by penalty. The CNW's proposition is tantamount to the suggestion that every rail crossing case constitutes prohibited regulation of interstate commerce. Even if it is assumed that a claim for damages arising under state law has the effect of proscribing certain conduct by imposing damages for failure to perform duties imposed by state law, the state law action may nonetheless proceed in the absence of a demonstrated[10]

---

8. 49 U.S.C. §11121, formerly §1(11) of the Interstate Commerce Act includes the Esch Car Service Act as amended by the Transportation Act of 1920.

9. In the absence of state regulation, *Missouri, Pacific R.R. Co. v. Stroud*, 267 U.S. 404, 407-408 (1925); *Powell v. United States*, 300 U.S. 276, 287 (1937); *United States v. New River Co.*, 265 U.S. 533, 541-542 (1923), are inapposite. See, *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656, 663-664 (1961).

10. In the proceedings below, the CNW made no showing that Kalo's state law action burdened interstate commerce.

burden, not contemplated by Congress, upon interstate commerce of an inconsistency with federal law. *DeCanas v. Bica,* 424 U.S. 351, 357-358 (1976); *Florida Avocado Growers v. Paul,* 373 U.S. 132, 142 (1963); *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 767, 770 (1945); *Johnson v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.,* 400 F.2d 968, 971-972 (9th Cir. 1968).

The Iowa Supreme Court decision that the trial court had subject matter jurisdiction to consider Kalo's state law claims properly confirmed the existence of a cumulative state law remedy under 49 U.S.C. §10103, which neither burdens interstate commerce nor interferes with federal law.

II.

The Omission By The Iowa Supreme Court Of Issue Preclusion As A Ground Of Decision Does Not Raise A Federal Question Reviewable Under 28 U.S.C. §1257(3).

The Iowa Supreme Court's omission of issue preclusion in its opinion below might have rested on state grounds. Under such circumstances certiorari is inappropriate. *Durley v. Mayo,* 251 U.S. 277 (1965); *Lynch v. People, ex rel. Pierson,* 293 U.S. 52 (1934).

The Iowa doctrine of issue preclusion requires the satisfaction of four conditions before it may be used defensively to bar relitigation of issues between parties in subsequent proceedings: (1) The issue or cause of action precluded must be identical; (2) The issue must have been raised and litigated in a prior action; (3) The issue must have been material and relevant to a disposition of the prior action; and (4) The determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *Schneberger v. United States*

Fidelity & Guaranty Co., 213 N.W.2d 913, 917 (Iowa 1973); *Matter of Evans*, 267 N.W.2d 48 (Iowa 1978). As a corollary, the doctrine applies only to ultimate facts, and not evidentiary facts. *State v. Stergion*, 248 N.W.2d 911, 913 (Iowa 1976).

The Iowa Court could have found that the doctrine was not applicable for any one of the following reasons:

(1) The issues before the Interstate Commerce Commission and the District Court of Iowa were not the same. The case before the District Court involved issues based essentially upon negligence and tortious interference with existing business relations, whereas the ICC proceedings were limited to the question of whether the CNW was entitled to a certificate of convenience and necessity to formally abandon its branch line; *B & B Asphalt Co. v. T. S. McShane Co.*, 242 N.W.2d 279, 286 (Iowa 1976).

(2) The issues framed by the pleadings before the Iowa District Court were not the same as the issues framed by the CNW in its application before the ICC. *Schneberger v. U.S. Fidelity & Guaranty Co.*, 213 N.W.2d 913 (Iowa 1973). See *Commissioner v. Sunnan*, 333 U.S. 591, 598 (1948); *Bayer v. Associated Underwriters, Inc.*, 402 S.W.2d 11, 13 (Mo. App. 1966).

(3) The abandonment issues before the ICC were not material to and postdated Kalo's damage claims for violation of Sections 497.3 (failure to provide car service), and 497.122 (negligence), Code of Iowa 1973, and tortious interference.

(4) The ICC Order [Appendix 34(a)40(a)] did not reach the ultimate facts which were at issue before the Iowa District Court. *Bickford v. American Interinsurance Exchange*, 224 N.W.2d 450, 455 (Iowa 1974); *Bertran v. Glens Falls Ins. Co.*, 232 N.W.2d 527 (Iowa 1975).

(5) Because Kalo's business had been destroyed as a result of the conduct of the CNW by the time it made application for abandonment, Kalo did not have the incentive to fully and vigorously litigate the abandonment issue. See *Parklane Hosiery v. Shore*, 439 U.S. 322, 58 L.Ed.2d 552, 561, 562, n. 15 (1979).

Where the doctrine of issue preclusion could have been found inapplicable or not controlling, the Iowa court would have had no reason to consider the effect of the Supremacy Clause of the United States Constitution. As a consequence, the omission by the Iowa Supreme Court of issue preclusion as a ground of its decision does not raise a federal question reviewable under 28 U.S.C. §1257(3).

III.

The Iowa Supreme Court Decision That The Doctrine Of Primary Jurisdiction Did Not Apply To Kalo's State Law Claim Was Based Upon Established Principles.

The Iowa Supreme Court, relying on the principles set forth in *Far East Conference v. United States*, 342 U.S. 370 (1952) held that the doctrine of primary jurisdiction did not apply to Kalo's state law claims because the grounds asserted for relief raised issues of fact coming within the conventional experience of judges and did not otherwise require the exercise of administrative discretion. The thrust of Kalo's Petition alleged that its damages were sustained as a result of the CNW's negligence and tortious interference with contractual relationships for which it was entitled to assert a state law remedy under 49 U.S.C. §10103. Kalo did not plead, nor did it rely upon any federal statute or regulation.

The doctrine of primary jurisdiction applies only where: (1) The controverted question[11] falls within the jurisdictional scope of a regulatory agency; and (2) The resolution of the question posed requires the exercise of administrative discretion to accomplish uniform policy; or (3) The facts underlying the question are not within the conventional experience of judges and require expertise or specialized knowledge for rational analysis. *Far East Conference v. United States*, 342 U.S. 370 (1952); *United States v. Western Pacific R.R. Co.*, 352 U.S. 59 (1956).

The CNW contends that Kalo's claim of negligence is within the Commission's jurisdiction because it involved the "reasonableness" of the CNW's conduct. As a corollary, the CNW argues that conduct once found to be reasonable by the Interstate Commerce Commission cannot later serve as a basis for a negligence action. A finding by the Commission that the CNW acted reasonably in abandoning the Kalo branch line, however, does not immunize the CNW from Kalo's state law claims. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141-142 (1963). Furthermore, even if the Commission decided that the CNW's conduct was reasonable in the context of abandonment proceedings, that determination is not material to Kalo's state law action because: (1) The ICC's determination of reasonableness was made after Kalo's claim accrued and considered facts existent at the time of the abandonment proceedings, including the fact that Kalo, as the only branch line customer, had gone out of business; (2) The Commission's determination of reasonableness was based upon a different standard than that used to measure Kalo's state law claims; (3) Similarly, Kalo's claim for damages under state law was not dependent upon the Commission or federal law for definition.

---

11. See *Great Northern R. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922).

Therefore, the questions that the CNW urged were subject to determination by the Commission were not pertinent to the controverted questions before the Iowa court and were not dependent on the exercise of administrative discretion to answer the ultimate questions necessary to sustain Kalo's state law claims. As a result, the doctrine of primary jurisdiction does not apply. *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922).

The effect of the CNW's position that Kalo's state law claims for negligence and tortious interference are first subject to Commission consideration in effect permits a railroad to preempt a litigant's right to exercise a state law remedy pursuant to 49 U.S.C. §10103 by superimposing conclusions of a federal administrative agency concerned with substantive considerations unrelated to those facts giving rise to Kalo's claim for relief. By contending that the doctrine of primary jurisdiction applies to Kalo's state law claim while simultaneously arguing that Kalo should be precluded by the findings of the Commission, the CNW seeks to shift lawmaking power from state courts to the Commission, *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 65 (1956), to indirectly eliminate a litigant's right to assert cumulative remedies in state courts under 49 U.S.C. §10103.

CONCLUSION

The Interstate Commerce Act expressly preserves the right of litigants to pursue remedies arising from state law in state courts. The preservation of cumulative remedies by Congress clearly demonstrates that state law claims were not considered unduly burdensome on, or a regulation of, interstate commerce.

In exercising its concurrent jurisdiction the trial court was not required to defer to the Commission because the controverted questions were matters of Iowa and not federal law. In the absence of a determination by the Commission of ultimate facts upon issues material to Kalo's state law claims, the Iowa court was not required to consider collateral estoppel as a ground of decision. The Iowa Supreme Court properly exercised its jurisdiction by confirming Kalo's right to pursue its state law remedies in state court.

For these and the other reasons set forth above, Respondent respectfully prays that the Petition for Writ of Certiorari to the Supreme Court of Iowa be denied.

Respectfully submitted,

M. GENE BLACKBURN
NED ALAN STOCKDALE
142 North 9th Street
Fort Dodge, Iowa 50501
Telephone: 515/576-2171
Attorneys for Respondent

Supreme Court, U.
FILED
MAY 15 1980
MICHAEL RODAK, JR., CLERK

No. 79-1336

In the
Supreme Court of the United States

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

LOUIS T. DUERINCK
JAMES P. DALEY
STUART F. GASSNER
400 W. Madison Street
Chicago, Illinois 60606
Telephone: (312) 454-6506

FRANK W. DAVIS, JR.
BRUCE E. JOHNSON
2600 Ruan Center
Des Moines, Iowa 50309
Telephone: (515) 243-6251
Attorneys for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

INDEX

PAGE

CITATIONS i

ARGUMENT 2

CONCLUSION 5

CITATIONS

Cases

Brown v. *Chicago, Rock Island & Pacific R. Co.*, 108 F.Supp. 164, 166-168 (N.D. Iowa 1952) 3

Donelon v. *New Orleans Terminal Company*, 474 F2d 1108, 1112-1113 (5th Cir. 1973), Cert. Denied, 414 U.S. 855 2

Missouri Pacific Railroad Company v. *Stroud*, 267 U.S. 404, 405, 407-408 (1924) 3

Napier v. *Atlantic Coast Line Railroad Company*, 272 U.S. 605, 612-613 (1926) 2

Powell v. *United States*, 300 U.S. 276, 287 (1937) 3

Transit Commission v. *United States*, 289 U.S. 121, 126-129 (1932) 3

Statutes

Interstate Commerce Act
49 U.S.C. §10101, et seq. formerly 49 U.S.C. §1, et seq. 5

In The

SUPREME COURT OF THE UNITED STATES

No. 79-1336

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER, CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY

ARGUMENT

Where The Subject Area That Is The Basis Of A State Law Claim Has Been Preempted By Federal Law, The Fact That The Claim Is For Damages Does Not Alter The Preemptive Effect Of The Federal Law, And State Law Affecting The Subject Is Therefore Inapplicable.

Respondent Kalo Brick & Tile Company ("Kalo") contends at page seven of its Brief In Opposition that since its claim is for damages, the Interstate Commerce Act cannot preempt state law in the subject area of the action. Kalo argues that if federal law preempts state law with regard to the subject matter of the present case, then every rail crossing accident must constitute a prohibited regulation of interstate commerce. This attempted analogy is not only inapposite but actually demonstrates the invalidity of Kalo's overall position.

There are no federal statutes or regulations governing warning apparatus required at crossings or the circumstances under which whistle and bell signals must be given by moving trains. These subjects are therefore proper subjects of state law in rail crossing cases. However, where federal statutes or regulations are directed at the same subject and act on the same object as state law, the state law is preempted by the federal law. *Napier* v. *Atlantic Coast Line Railroad Company,* 272 U.S. 605, 612-613 (1926) (Congressional grant of power to the Interstate Commerce Commission to regulate equipment required on locomotives preempted state power to enact any equipment requirements for locomotives in interstate commerce); *Donelon* v. *New Orleans Terminal Company,* 474 F2d 1108, 1112-1113 (5th Cir. 1973), Cert.

Denied, 414 U.S. 855 (federal law preempts state law in area of railroad roadbed repair and maintenance). Where federal law preempts state law, a state law action for damages is precluded. *Missouri Pacific Railroad Company* v. *Stroud,* 267 U.S. 404, 405, 407-408 (1924) (action for treble damages based on state car service statute not permissible); *Brown* v. *Chicago, Rock Island & Pacific R. Co.,* 108 F.Supp. 164, 166-168 (N.D. Iowa 1952) (in railroad crossing accident damage claim could not be predicated upon state law requirements as to power and brilliancy of headlight because federal law had preempted state law in the area).

The alleged acts or omissions of the Chicago and North Western Transportation Company ("Transportation Company") upon which Kalo bases its claims are that the Transportation Company wrongfully stopped running cars engaged in interstate commerce over a branch line to Kalo's plant site and/or it abandoned a line of railroad and the transportation service it had provided over the line. These subjects have been preempted by federal law. *Missouri Pacific Railroad Company* v. *Stroud,* 267 U.S. 404, 407-408 (1924) (car service); *Powell* v. *United States,* 300 U.S. 276, 287 (1937) (line abandonments and extensions); *Transit Commission* v. *United States,* 289 U.S. 121, 126-129 (1932) (line abandonments and extensions).

In *Transit Commission* v. *United States, supra,* at 126-129, this Court commented upon the historic necessity for preemptive federal legislation governing, and exclusive Interstate Commerce Commission authority over, the subject of railroad line abandonments and extensions:

"These provisions do not specifically mention trackage agreements providing for joint use of railroad lines, tracks or other facilities by two or more carriers. The question is whether the general language of paragraph (18) includes the arrangement under consideration. Prior to the Transportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation had been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for. Minnesota Rate Cases (Simpson v. Shepard) 230 U.S. 352, 433, 57 L. ed. 1151, 1555, 33 St. Ct. 729, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18. And it was everywhere known that enormous sums had been expended by interstate railroad carriers for the construction and operation of lines that were not needed or likely to be needed. Such investments had brought financial ruin to some and had made doubtful the power of many to continue operation in other than flush times. Need for effective regulation in this field had become urgent, and undoubtedly the Congress, by the provisions above referred to, intended to confer upon the Commission plenary power to limit interstate carriers' expenditures for construction or operation to lines of railroad reasonably necessary for the service of the public.

. . . The Act, including paragraph (18) and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate. (citations omitted)

. . . On the taking effect of the Transportation Act the state commission was stripped of power to prescribe terms for such operation. The authority of the Interstate Commerce Commission is paramount

and, in respect of the operation and agreement under consideration, it is necessarily exclusive."

State legislatures, agencies, judges, and juries are precluded from governing the conduct of interstate rail carriers in subject areas that have been preempted by federal law. The subject area of the present action has been preempted by the Interstate Commerce Act, 49 U.S.C. §10101, et seq., formerly 49 U.S.C. §1, et seq.

CONCLUSION

For the reasons set forth above and in the Transportation Company's Petition, petitioner respectfully prays that a Writ of Certiorari be granted to review the judgment of the Supreme Court of Iowa and the judgment of the Iowa Court of Appeals.

Respectfully submitted,

LOUIS T. DUERINCK
JAMES P. DALEY
STUART F. GASSNER
400 W. Madison Street
Chicago, Illinois 60606
Telephone: (312) 454-6506

FRANK W. DAVIS, JR.
BRUCE E. JOHNSON
2600 Ruan Center
Des Moines. Iowa 50309
Telephone: (515) 243-6251
Attorneys for Petitioner

Supreme Court, U.S.
FILED
MAY 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-1336

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, PETITIONER

v.

KALO BRICK & TILE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF IOWA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

CHARLES A. STARK
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

INDEX

	Page
Questions presented	1
Interest of Amici Curiae	2
Statement	3
Argument	7
Conclusion	20

CITATIONS

Cases:

Alabama Public Service Comm'n v. *Southern Ry.*, 341 U.S. 341	17
Asbury v. *Chesapeake & Ohio Ry.*, 341 F. Supp. 310	9
Baltimore Chamber of Commerce v. *Baltimore & O. R.R.*, 45 I.C.C. 40	9
Chicago & N.W. Ry. v. *Union Packing Co.*, 373 F. Supp. 734, aff'd, 514 F.2d 30	9
Chicago, Rock Island & Pacific Ry. v. *Hardwick Farmers Elevator Co.*, 226 U.S. 426	10
Ciba Corp v. *Weinberger*, 412 U.S. 640	19
Colorado v. *United States*, 271 U.S. 153	4, 15, 17
Eastern Ry. v. *Littlefield*, 237 U.S. 140	9, 15
Elgin Coal Co. v. *Louisville & Nashville R.R.*, 411 F.2d 1043	19
Far East Conference v. *United States*, 342 U.S. 570	18
General Foods Corp. v. *Baker*, 451 F. Supp. 873	9
Hines v. *Davidowitz*, 312 U.S. 52	10
ICC v. *Atlantic Coast Line R.R.*, 383 U.S. 576	4, 18

Cases—Continued Page

ICC v. *Chicago & N.W. Transp. Co.*, 533 F.2d 1025 9
ICC v. *Railway Labor Executives Ass'n*, 315 U.S. 373 17
Illinois Central R.R. v. *Mulberry Hill Coal Co.*, 238 U.S. 275 14
Jones v. *Rath Packing Co.*, 430 U.S. 519 .. 10, 12
Loomis v. *Lehigh Valley R.R.*, 240 U.S. 43 19
Maine Department of Transp. v. *ICC*, 587 F.2d 541 17
Midland Valley R.R. v. *Barkley*, 276 U.S. 482 ..... 15, 19
Missouri Pacific R.R. v. *Stroud*, 267 U.S. 404 10
Nader v. *Allegheny Airlines, Inc.*, 426 U.S. 290 10
New York Central R.R. v. *United States*, 201 F. Supp. 958, appeal dismissed, 371 U.S. 805 9
Pan American Petroleum Corp. v. *Superior Court*, 366 U.S. 656 11
Pennsylvania R.R. v. *Puritan Coal Mining Co.*, 237 U.S. 121 13
Pennsylvania R.R. v. *Sonman Shaft Coal Co.*, 242 U.S. 120 14
Perez v. *Campbell*, 402 U.S. 637 ..... 10, 12
Powell v. *United States*, 300 U.S. 276 12
Purcell v. *United States*, 315 U.S. 381 17
Taylor County Sand Co. v. *Seaboard Coast Line R.R.*, 446 F.2d 853 19
Texas & Pacific Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 ..... 10, 15
United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 19

Cases—Continued Page

United States v. *New River Co.*, 265 U.S. 533 11
Winnebago Farmers Elevator v. *Chicago & N.W. Transp. Co.*, 354 I.C.C. 859 19

Statutes:

Esch Car Service Act of 1917, ch. 23, 40 Stat. 101 8
Interstate Commerce Act, 49 U.S.C. (1970 ed.) 1 *et seq.*:
49 U.S.C. (1970 ed.) 1(1) 2, 3
49 U.S.C. (1970 ed.) 1(4) 3, 8, 9
49 U.S.C. (1970 ed.) 1(11) 3, 8, 9
49 U.S.C. (1970 ed.) 1(14) 8
49 U.S.C. (1970 ed.) 1(14)(a) 3
49 U.S.C. (1970 ed.) 1(18) 4, 16, 17
49 U.S.C. (1970 ed.) 8 4
49 U.S.C. (1970 ed.) 9 ..... 4, 6, 11
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 3
Transportation Act of 1920, ch. 91, 41 Stat. 456, 476 8
Pub. L. No. 95-473, 92 Stat. 1337 3
28 U.S.C. 2321 ..... 9, 19
28 U.S.C. 2342(5) 19

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1336

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, PETITIONER

v.

KALO BRICK & TILE COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF IOWA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

In this case, a shipper filed an action for damages in a state court against a railroad subject to the jurisdiction of the Interstate Commerce Commission, alleging that the railroad's cessation of service to the shipper violated the railroad's obligation under state statutory and common law. In separate proceedings

under the Interstate Commerce Act, however, the Commission held that the railroad's cessation of service was for reasons beyond its control and was therefore lawful under that Act. The Commission also granted the railroad's application under 49 U.S.C. (1970 ed.) 1(18) to abandon the line of track serving the shipper. The questions presented are:

1. Whether the Interstate Commerce Act precludes a state court from awarding damages to the shipper under state law in these circumstances.

2. Whether, if a cause of action does lie under state law, the Interstate Commerce Commission has primary jurisdiction to determine whether the railroad's cessation of service and abandonment of the line were lawful.

INTEREST OF AMICI CURIAE

The Interstate Commerce Commission is the federal agency charged generally with the regulation of railroads engaged in interstate commerce. Such regulation necessarily extends to determining whether an interstate railroad is furnishing an adequate level of service, whether a cessation of rail service in interstate commerce is reasonable in a particular instance, and whether the public convenience and necessity permit abandonment of a rail line used in interstate commerce. The Commission's ability to take a consistent, nationwide approach to these problems affecting the interstate rail system would be severely undercut by the allowance of suits brought under

state law to recover damages for actions by a railroad that are subject to the exclusive jurisdiction of the Commission, particularly where, as here, the Commission has found the railroad's actions to be lawful and in the public interest under federal law.

STATEMENT

1. Petitioner is a common carrier by railroad subject to the jurisdiction of the Interstate Commerce Commission under the Interstate Commerce Act, 49 U.S.C. (1970 ed.) 1(1).[1] The Act sets forth the obligations of rail carriers subject to the Commission's jurisdiction and establishes a comprehensive mechanism for the enforcement of those obligations.

Thus, the Act requires carriers to provide and furnish transportation upon reasonable request (49 U.S.C. (1970 ed.) 1(4); Pet. App. 42a) and to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to such service. 49 U.S.C. (1970 ed.) 1(11), 1(14)(a); Pet. App. 43a-

---

[1] The Interstate Commerce Act was revised, recodified, and reenacted without substantive change as subtitle IV of Title 49, United States Code. Pub. L. No. 95-473, 92 Stat. 1337. For convenience, references in this brief will be to the original Act, because the decisions below, the controlling decisions of this Court, and the relevant decisions of the Interstate Commerce Commission cite the original Act.

The Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. No. 94-210, 90 Stat. 31) also made certain changes in Section 1 of the Interstate Commerce Act that are not pertinent to the issues in this case.

45a. When a railroad fails to meet its statutory duties, the Act renders the railroad liable in damages to persons injured as a consequence. 49 U.S.C. (1970 ed.) 8; Pet. App. 50a. A person seeking damages may file a complaint either with the Commission or in any district court of the United States (49 U.S.C. (1970 ed.) 9), although the primary jurisdiction doctrine requires initial submission to the Commission of issues of nationwide transportation policy under the Act. See *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 579 (1966). Finally, before a railroad may abandon or discontinue the operation of a line, it must obtain a certificate from the Commission based on a finding that the public convenience and necessity permit such abandonment. 49 U.S.C. (1970 ed.) 1(18); Pet. App. 48a-49a. See *Colorado* v. *United States*, 271 U.S. 153 (1926).

2. Prior to April 1973, petitioner operated a branch line, 5.6 miles in length, between Fort Dodge and Kalo, Iowa. Respondent operated a brick manufacturing plant near Kalo at the terminus of petitioner's branch line. Petitioner furnished cars to respondent for use exclusively in interstate commerce; respondent's shipments within the State of Iowa were made by truck (Pet. App. 13a, 33a). By April 1973, respondent was the only shipper using the line (*id.* at 35a).

In 1961 and 1966 the tracks on the branch line were damaged by earth slides, but petitioner made

necessary repairs (Pet. App. 14a). Another slide occurred in March 1967, when the embankment disappeared into the Des Moines River at several locations on one stretch of the line. Service was never resumed over that stretch (*ibid.*). Instead, petitioner leased a portion of another branch line between Kalo and Fort Dodge owned by the Des Moines & Southern Railway to bypass the damaged stretch of its own line. By using the leased track and the remaining portion of its own line, petitioner was able to continue to serve respondent (*id.* at 14a-15a).

On April 4, 1973, additional slides damaged the leased portion of the Des Moines & Southern line. Petitioner promptly notified respondent that it could no longer provide cars to respondent's plant, and petitioner then terminated service (Pet. App. 15a). Petitioner did, however, provide cars to respondent at Fort Dodge, although respondent was required to deliver its goods to Fort Dodge by truck at its own expense. On April 18, 1973, respondent notified its customers that it was going out of business but that it would complete existing contracts (*ibid.*).

3. On November 14, 1973, petitioner applied to the Commission for a certificate of public convenience and necessity to abandon its line between Fort Dodge and Kalo. Respondent protested the application (Pet. App. 17a).

On April 30, 1976, the Commission concluded that the present and future public convenience and necessity permitted the abandonment (Pet. App. 34a-

40a). The Commission first held that the cessation of service in 1973 "occurred because of conditions over which [petitioner] had no control, not because of willful abandonment" (Pet. App. 35a). The Commission further found that, due to the soil condition and mining activities in the vicinity of the lines, any repairs made to petitioner's line and the leased portion of the Des Moines & Southern line would be insufficient to insure continuous operation over them.[2] For these reasons, the Commission concluded that continued operation of the line would be an unnecessary burden on petitioner and on interstate commerce (*id.* at 35a-36a). Respondent's petition for reconsideration of this ruling was denied (*id.* at 41a), and respondent sought no further administrative or judicial review of the decision. Nor did respondent file a damage action in federal court under 49 U.S.C. (1970 ed.) 9 alleging that petitioner had unlawfully ceased service and abandoned its line.

4. In September 1974, respondent instituted this action against petitioner in Iowa state court, alleging that petitioner's failure to furnish cars and service after April 1973 was in violation of state statutory and common law and that respondent was thereby damaged in the amount of $350,000 (Pet. App. 18a). In April 1976, respondent amended its complaint to allege that petitioner had been negligent in the main-

---

[2] The Commission found that it would cost $150,000 to rehabilitate petitioner's line and $100,000 to rehabilitate the leased track, even on a temporary basis (Pet. App. 35a).

tenance of the roadbed in 1973 and had tortiously interfered with respondent's contracts with its customers.

In October 1976, the state trial court dismissed the suit, holding that the questions raised were within the exclusive jurisdiction of the Interstate Commerce Commission (Pet. App. 21a, 23a-25a). However, in October 1979, the Court of Appeals of Iowa reversed and remanded for trial (*id.* at 2a-12a). In the Court of Appeals' view, the state trial court had jurisdiction to adjudicate respondent's suit based on petitioner's alleged violations of state law, and the Interstate Commerce Act had not preempted that jurisdiction (*id.* at 5a-10a). The court also held that there was no need to defer to the Commission under the doctrine of primary jurisdiction because the issues raised are within the conventional experience of judges and do not require the exercise of administrative expertise (*id.* at 10a-11a). The Supreme Court of Iowa, by order dated November 30, 1979, refused to grant further review (*id.* at 1a).

ARGUMENT

The decision of the Court of Appeals of Iowa presents important questions warranting this Court's review. The Interstate Commerce Act and decisions of this Court establish, we submit, that the Interstate Commerce Commission has exclusive jurisdiction to determine whether interstate railroads have complied with their obligations to provide adequate service to

shippers and whether such railroads may abandon lines of track. The decision below would subject a railroad to liability for damages under state law for cessation of service and abandonment of a line, even though the Commission has determined that the railroad's actions were lawful and in the public interest under the Interstate Commerce Act. This would significantly impair the Commission's ability to carry out its statutory responsibilities and would impose potentially conflicting obligations on railroads subject to the Commission's jurisdiction. Whether such a result is consistent with the scheme of the Interstate Commerce Act is an important question that should be reviewed by this Court.

1. By holding that petitioner may be liable in damages under state law for its cessation of service to respondent in April 1973, the decision below clashes with the Commission's exclusive jurisdiction to determine whether a railroad subject to the Interstate Act is providing an adequate level of service.

a. As noted above (see pages 3-4, *supra*, the Interstate Commerce Act imposes on interstate railroads the obligation to provide and furnish transportation upon reasonable request and to furnish safe and adequate car service to shippers. 49 U.S.C. (1970 ed.) 1(4) and 1(11). Furthermore, the Esch Car Service Act of 1917, ch. 23, 40 Stat. 101, and the Transportation Act of 1920, ch. 91, 41 Stat. 456, 476, give the Commission broad powers to establish rules and regulations defining the carriers' service obligations. See 49 U.S.C. (1970 ed.) 1(14).

It is well settled in the administration of these provisions that when a rail carrier ceases or suspends service for reasons allegedly beyond its control (a practice commonly known as an "embargo"), the Commission has jurisdiction under 49 U.S.C. (1970 ed.) 1(4) and (11) to determine the reasonableness and thus the lawfulness of the cessation or suspension. See, *e.g.*, *ICC* v. *Chicago & N.W. Transp. Co.*, 533 F.2d 1025, 1027 n.2 (8th Cir. 1976); *New York Central R.R.* v. *United States*, 201 F. Supp. 958, 960 (S.D.N.Y. 1962), appeal dismissed, 371 U.S. 805 (1962); *Asbury* v. *Chesapeake & Ohio Ry.*, 314 F. Supp. 310, 313 (D.D.C. 1970). Accord, *Baltimore Chamber of Commerce* v. *Baltimore & O. R.R.*, 45 I.C.C. 40, 53 (1917). Once an embargo is lawfully imposed, a railroad is not obligated to furnish car service and is not liable to a shipper for damages under the Act. *Chicago & N.W. Ry.* v. *Union Packing Co.*, 373 F. Supp. 734, 737 (D. Neb. 1974), aff'd, 514 F.2d 30 (8th Cir. 1975); *ICC* v. *Chicago & N.W. Transp. Co.*, *supra*, 533 F.2d at 1027 n.2; *General Foods Corp.* v. *Baker*, 451 F. Supp. 873, 876 (D. Md. 1978). See also *Eastern Ry.* v. *Littlefield*, 237 U.S. 140, 145 (1915).

The Commission's jurisdiction to determine the reasonableness of a cessation of service is necessarily exclusive (subject, of course, to judicial review of the Commission's order under 28 U.S.C. 2321), and the Interstate Commerce Act accordingly preempts state laws that purport to establish inde-

pendent service obligations on carriers subject to the Commission's jurisdiction. If this were not so, carriers would face conflicting obligations when, as could occur under the decision below, a state court disagrees with the Commission's determination of the reasonableness of an embargo or the carrier's level of service to shippers. See *Perez* v. *Campbell*, 402 U.S. 637, 651-652 (1971); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), compare *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 299-300 (1976). Thus, recognition of a state law damage remedy would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977), quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Indeed, this Court has squarely held that the standards and enforcement provisions of the Interstate Commerce Act preempt state law with respect to the service obligations of interstate carriers. In *Missouri Pacific R.R.* v. *Stroud*, 267 U.S. 404, 408 (1925), the Court held that a shipper could not bring suit in state court alleging that a carrier's failure to supply cars to the shipper violated state law, explaining that "state law has no application to the furnishing of cars to shippers for the transportation of freight in interstate commerce." See also *Chicago, Rock Island & Pacific Ry.* v. *Hardwick Farmers Elevator Co.*, 226 U.S. 426, 433 (1913); *United*

States v. *New River Co.*, 265 U.S. 533, 541-542 (1924).[3]

b. The Iowa Court of Appeals conceded (Pet. App. 10a) that if the state statutes in question here were "regulatory" in nature, "it could not be gainsaid that federal law is supreme, rendering state law void." But the court concluded (*ibid.*) that the state law relied on by respondent is "remedial only" and "exerts no burden on interstate commerce, nor does it interfere with regulatory powers and duties of the ICC."[4] The court plainly erred, both in its reasoning and its conclusions.

---

[3] As noted earlier (page 4, *supra*), the Interstate Commerce Act also gives jurisdiction to federal district courts over complaints that carriers have failed to meet their service obligations or have unlawfully abandoned lines. 49 U.S.C. (1970 ed.) 9. But respondent did not file a damage action in federal court. State courts have no jurisdiction to entertain actions under 49 U.S.C. (1970 ed.) 9, and they cannot impose independent state law service obligations on carriers subject to the Act.

[4] Respondent advances these same arguments in its Brief in Opposition (at 7-8). Respondent cites *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656, 663-664 (1961), for the proposition that a cause of action under Iowa state law has not been preempted because the state law is not "regulatory" in nature. But the Court there held only that a provision of the Natural Gas Act conferring exclusive jurisdiction on federal courts in cases arising under that Act did not deprive a state court of jurisdiction over a state law breach-of-contract claim involving the sale of natural gas, even though a defense arising under federal law might be interposed. The Court expressly declined to decide whether the Natural Gas Act abrogated the substantive state law contract rights involved. 366 U.S. at 664. Here, of course, the question is whether federal law preempts the substantive law

First, preemption does not turn on the characterization of the state law in question as "remedial" or "regulatory" in nature or the intent of the state legislature in enacting it. *Perez* v. *Campbell*, *supra*, 402 U.S. at 650-652. It is the *effect* of the state law on the accomplishment of the purposes underlying the federal statute that is determinative. *Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 526. Conduct that would be inconsistent with that ordered or sanctioned pursuant to federal law could be compelled by a state as readily by authorizing private damage actions labeled "remedial" as through a "regulatory" program administered by a state agency.

Second, contrary to the assumption of the court below, a state award of damages for conduct found lawful under federal law can burden interstate commerce, both because the award itself diminishes the total resources the carrier has available to operate

---

upon which respondent relies, not the jurisdiction, as such, of the Iowa courts to entertain actions for negligence or interference with contractual rights brought against railroads subject to the jurisdiction of the Commission.

Moreover contrary to respondent's contention (Br. in Opp. 7 n.9), there is nothing in *Missouri Pacific R.R.* v. *Stroud*, *supra*, to suggest that its holding was dependent on the existence of a "regulatory" rather than a "remedial" state law. Indeed, that case, like this one, was a private damage action brought for violation of a state statute. There is likewise nothing in *Powell* v. *United States*, 300 U.S. 276, 287 (1937), or *United States* v. *New River Co.*, *supra*, to support respondent's contention (Br. in Opp. 7 n.9) that preemption principles are applicable in this area only where there is state "regulation" by means of an administrative process.

in interstate commerce and because the threat of such awards will lead carriers to divert to local concerns scarce resources needed elsewhere to satisfy the demands of interstate commerce. And third, for these same reasons, the railroad's potential liability under state law would interfere with the Commission's effective exercise of its regulatory powers, because such liability would effectively compel carriers to furnish transportation that the Commission has determined or may determine could properly be withheld or terminated under federal law. In the present case, the Commission, in a proceeding to which respondent was a party, held that petitioner's cessation of service in April 1973 was not unlawful, but instead "occurred because of conditions over which [petitioner] had no control * * *" (Pet. App. 35a). Any decision by the state court finding petitioner liable in damages under state law would necessarily conflict with that determination.

c. The Court of Appeals' and respondent's reliance on several decisions by this Court in support of the judgment below is misplaced (see Pet. App. 6a-10a; Br. in Opp. 5-8). In *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915), the case principally relied upon, the Court upheld a state court damage suit by a shipper claiming that the railroad had unjustly discriminated against it by failing to supply cars in accordance with a rule promulgated by the railroad itself. The Court stressed that in cases "where the [railroad's] rule of practice itself is at-

tacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission." 237 U.S. at 131. But the Court held that where, as in *Puritan*, a railroad is sued for violating its own rule or practice, which is lawful and unchallenged on its face, state courts have jurisdiction "to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage." 237 U.S. at 132.

The limited holding in *Puritan*, recognizing state remedies only where the reasonableness of the carrier's rule or practice is not called into question and where there is no need to rely on the expertise of the Commission, was expressly reaffirmed in *Illinois Central R.R.* v. *Mulberry Hill Coal Co.*, 238 U.S. 275, 281-283 (1915), and *Pennsylvania R.R.* v. *Sonman Shaft Coal Co.*, 242 U.S. 120, 124-126 (1916), upon which the Court of Appeals and respondent also rely.[5] See also *Midland Valley R.R.* v. *Barkley*,

---

[5] In *Mulberry*, the plaintiff did not attack the railroad's rule of distributing cars, so no issue within the Commission's exclusive or primary jurisdiction was presented. 238 U.S. at 281-283. In *Sonman*, the Court found that industry conditions were normal and that the shipper's demands were reasonable; the carrier's rule or practice for allocating rail cars was therefore not a factor in the decision of the case, and the exercise of the Commission's expertise was not required. But in the instant case, conditions clearly were abnormal. Repeated earth slides had disrupted petitioner's line, and circumstances called for the administrative expertise of the Commission in determining whether the requirements of interstate commerce warranted continued service to respondent.

276 U.S. 482 (1928); *Eastern Ry.* v. *Littlefield*, *supra*, 237 U.S. at 143. The preservation of other remedies by Section 22 of the Interstate Commerce Act (see Pet. App. 6a; Br. in Opp. 6) therefore must be read to preserve state law remedies only where they are not inconsistent with the federal statutory scheme. See *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, *supra*, 204 U.S. at 446-447.

The instant case, in contrast to *Puritan*, involves an assertion by respondent that petitioner's "practice" of discontinuing service subsequent to the earth slides was unreasonable and unlawful. As *Puritan* itself indicates, that is an issue only the Commission can resolve (subject, of course, to judicial review in the federal courts), and the Commission has done so here, rejecting respondent's contention. A judgment by the Iowa courts against petitioner would directly interfere with the Commission's responsibility to determine the degree of service warranted by the public interest and, in so doing, to weigh the needs of local communities on the line against the broader national interest in allocating the railroad's limited resources elsewhere. See *Colorado* v. *United States*, 271 U.S. 153, 164 (1926).[6]

2. The decision of the Court of Appeals also interferes with the Commission's statutory responsibility

---

[6] In addition, *Puritan* and the other decisions of this Court relied upon in the decision below preceded the enactment of the Esch Car Service Act of 1917 and the Transportation Act of 1920, which enactments plainly establish the Commission's plenary authority to fix a reasonable level of car service. See page 8, *supra*.

to determine whether the public interest and the national transportation policy warrant abandonment of a line of track.

It is apparently immaterial to the decision below whether the cessation of service or injury to respondent occurred before or after the Commission formally authorized abandonment of petitioner's line. Thus, respondent may be entitled to recover damages for its loss of business occasioned by the cessation of service both prior to and following the September 1976 Commission order approving the abandonment.

A recovery by respondent for loss of rail service after the effective date of abandonment in 1976 would directly conflict with the proper administration of the Interstate Commerce Act, which confers on the Commission the responsibility to determine whether an interstate railroad may abandon a line used in interstate commerce. 49 U.S.C. (1970 ed.) 1(18). Section 1(18) prohibits a railroad from abandoning a line unless the Commission issues a certificate that the present or future public convenience and necessity permit the abandonment.

This Court has recognized that Congress' purpose in enacting Section 1(18) was to remove local obstructions that would otherwise prevent a railroad from performing its federal duty. In *Colorado* v. *United States, supra,* the Court held that a state could not compel a railroad to continue operating a line after the Commission had authorized its abandonment. The Court explained that in enacting Sec-

tion 1(18), Congress sought to prevent states from requiring railroads to make excessive expenditures to promote local interests at the expense of the railroads' overall ability to provide interstate transportation. 271 U.S. at 162-164. See also *Maine Department of Transp.* v. *ICC*, 587 F.2d 541, 543 (1st Cir. 1978). Accordingly, the Act charges the Commission with weighing the benefits to particular communities and commerce of continued operations against the burdens on commerce generally. *Colorado* v. *United States, supra*, 271 U.S. at 168; *ICC* v. *Railway Labor Executives Ass'n*, 315 U.S. 373, 376-377 (1942); *Purcell* v. *United States*, 315 U.S. 381, 383-385 (1942). Once the Commission decides that the public convenience and necessity permit an abandonment, the states are powerless to require a railroad to expend additional funds and to continue service to those local communities served by the affected rail line. *Colorado* v. *United States, supra*, 271 U.S. at 162-164. See also *Alabama Public Service Comm'n* v. *Southern Ry.*, 341 U.S. 341, 346 n.7 (1951).

The Iowa Court of Appeals' decision in this case is therefore inconsistent with the statutory scheme to the extent that it would impose an independent state law obligation on petitioner to continue operations for the benefit of a particular shipper, notwithstanding a finding by the Commission that the public convenience and necessity do not warrant the diversion of the railroad's finite resources to satisfy the particular local interest. Hence, the state law re-

lied upon by the court below is necessarily preempted to the extent it would conflict with federal law.[7]

3. Even if a cause of action lies under state law in the circumstances of this case, the Iowa Court of Appeals erred in concluding that the Commission does not have primary jurisdiction over the dispute. The primary jurisdiction doctrine requires the initial submission to the Commission of questions that call for the application of uniform standards and national transportation policy and that are within the expertise of the Commission. *ICC* v. *Atlantic Coast Line R.R.*, *supra*, 383 U.S. at 579; *Far East Conference* v. *United States*, 342 U.S. 570 (1952). Both the courts and the Commission have held that whether an interstate railroad is providing an adequate level of service to its shippers is a question that ought to be decided on the basis of uniform national standards and that presents important issues of national transportation policy. It is also a question that usually calls for an expert assessment of the particular facts, including comparisons with the experience of comparable railroads. See *Loomis* v. *Le-*

---

[7] Moreover, even if the Iowa court were to limit damages to the period between April 1973 and September 1976, during which petitioner's embargo was in effect, the court's holding would infringe on the Commission's abandonment authority. There is always some delay between the time an abandonment application is filed and the time the Commission grants or denies it. As in this case, an embargo is often in effect in the interim. If states could compel a railroad to continue operations during this period, they could frustrate the Commission's abandonment authority by requiring massive last-minute commitments of funds in the local interest.

high Valley R.R., 240 U.S. 43, 48-51 (1916); *Taylor County Sand Co.* v. *Seaboard Coast Line R.R.*, 446 F.2d 853 (5th Cir. 1971); *Elgin Coal Co.* v. *Louisville & Nashville R.R.*, 411 F.2d 1043 (6th Cir. 1969); *Winnebago Farmers Elevator* v. *Chicago & N.W. Transp. Co.*, 354 I.C.C. 859 (1978). See generally *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); *Midland Valley R.R.* v. *Barkley, supra.*

Accordingly, even if a cause of action under state law survives in circumstances such as those presented here, the state court must defer to the Commission's primary jurisdiction on the central question of whether the railroad's cessation of service and ultimate abandonment were lawful. Once the Commission ruled in the present case that they were, the Iowa courts could not ignore that determination and award damages under state law for these actions.[8]

---

[8] Furthermore, we note that respondent participated in the proceedings before the Commission and had an opportunity to litigate the reasonableness of petitioner's embargo and whether the public convenience and necessity permitted abandonment of petitioner's line between Fort Dodge and Kalo. Respondent did not seek review of the Commission's final decision, as it was entitled to do under 28 U.S.C. 2321 and 2342 (5). In these circumstances particularly, respondent should not be permitted to relitigate those determinations in a state court suit. See *Ciba Corp.* v. *Weinberger*, 412 U.S. 640, 644 (1973).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

CHARLES A. STARK
Attorney
Interstate Commerce Commission

MAY 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 319645 302

SUPREME COURT, U.S.
FILED
JUL 30 1980
MICHAEL RODAK, JR., CLERK

No. 79-1336

In the
Supreme Court of the United States

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,
Petitioner,

vs.

KALO BRICK & TILE COMPANY,
Respondent.

On Certiorari to the Supreme Court of the United States.

PETITIONER'S BRIEF ON THE MERITS

LOUIS T. DUERINCK
JAMES P. DALEY
STUART F. GASSNER
400 West Madison Street
Chicago, Illinois 60606
Telephone: (312) 454-6506

FRANK W. DAVIS, JR.
BRUCE E. JOHNSON
JAMES D. POLSON
2600 Ruan Center
Des Moines, Iowa 50309
Telephone: (515) 243-6251
Attorneys for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

QUESTIONS PRESENTED

The Transportation Company operated over a five mile branch line that became physically impassable on April 4, 1973. Kalo was the only shipper on the line. Kalo has sued the Transportation Company in State Court for $350,000 in damages for destruction of its business. All of Kalo's rail shipments over the line were in Interstate Commerce. The Interstate Commerce ("Commission") had entered an order permitting the Transportation Company to abandon the line and finding that cessation of service was not an unlawful abandonment but was due to conditions beyond the Transportation Company's control, and that requiring reconstruction of the line would be an undue burden on the Transportation Company and on interstate commerce.

This case presents the following questions for review:

1. Has the Interstate Commerce Act preempted the power of state courts over rail carriers in matters of railroad line abandonment and provision of car service in interstate commerce?

2. Do the Supremacy Clause of the Constitution and the doctrine of res judicata/collateral estoppel require a state court to give effect to prior decisions of the Commission, acting within its exclusive jurisdiction, involving the same parties and the same issues?

3. Does the Commission, rather than a state court, have primary and exclusive jurisdiction in matters requiring a determination of whether it would be reasonable to require a rail carrier to expend capital to reconstruct a rail line in order to provide interstate service to a shipper in interstate commerce?

TABLE OF CONTENTS

PAGE

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 10

CONCLUSION 34

CITATIONS

Cases

Adams Express Company v. *Croninger*, 226 U.S. 491 (1912) 21, 22

Arrow Transportation Company v. *Southern Railway Company*, 372 U.S. 658 (1963) 23

Asbury v. *Chesapeake & Ohio Railway Company*, 314 F.Supp. 310 (D.D.C. 1970) 16, 17

Auracher v. *Omaha & St. L.R. Co.*, 102 F. 1 (Cir. Ct. S.D. Ia. 1900) 19

Baird Brothers v. *Minneapolis & St. Louis Railroad Co.*, 181 Iowa 1104, 165 N.W. 412 (1917) 18

Baltimore & Ohio Railroad Company, et al. v. *New York, New Haven & Hartford Railroad Company*, 196 F.Supp. 724 (S.D.N.Y. 1961) 30

Board of Supervisors, Carroll County v. *Chicago and North Western Transportation Company*, 260 N.W. 2d 813 (Ia. 1977) 30

PAGE

Bodine & Clark Livestock Commission Co. v. *Great Northern Ry. Co.*, 63 F.2d 472 (9th Cir. 1933), cert. denied 290 U.S. 629 (1933) 23, 24

Burlington Northern, Inc. v. *Department of Public Service*, 240 N.W.2d 554 (Mn. 1976) 17, 19, 27

Campbell v. *Hussey*, 368 U.S. 297 (1961) 12

Charleston & W.C.R. Co. v. *Varnville Furniture Co.*, 237 U.S. 597 (1915) 12, 27

Chicago v. *Atchison, Topeka & Sante Fe R. Co.*, 357 U.S. 77 (1958) 31

Chicago, M., St. P. & P.R. Co. v. *Michigan Public Service Commission*, 50 N.W.2d 884 (Mi. 1952) 27

Chicago and North Western Ry. Co. v. *Union Packing Co.*, 373 F.Supp. 734 (D.Ne. 1974) 16

Chicago, Rock Island and Pac. Ry. Co. v. *Hardwick Farmers Elevator Co.*, 226 U.S. 426 (1912) 13, 18, 22

Chicago, Rock Island & Pac. Ry. Co. v. *Linwood Stone Products Co.*, 138 N.W.2d 902 (Ia. 1965) 18

Davis v. *Keystone Steel & Wire Co.*, 148 N.E. 47 (Il. 1925) 27

Dayton-Goose Creek Railway Company v. *United States*, 263 U.S. 456 (1923) 14

Eastern Railway Co. v. *Littlefield*, 237 U.S. 140 (1915) 16

Elgin Coal Co. v. *Louisville & Nashville R.R. Co.*, 411 F.2d 1043 (6th Cir. 1969) 32

Ethan Allen, Inc. v. *Maine Central Railroad Co.*, 431 F.Supp. 740 (D.Vt. 1977) 17

Far East Conference v. *United States*, 342 U.S. 570 (1952) 33

General Foods Corporation v. *Baker*, 451 F.Supp 873 (D. Md. 1978) 16

PAGE

Gibbons v. *Ogden*, 22 U.S. (9 Wheaton) 1 (1824) 11, 12

Hampton v. *St. Louis, Iron Mountain and Southern Ry. Co.*, 227 U.S. 456 (1912).....13, 18, 22

Holt Motor Company v. *Nicholson Universal S.S. Co.*, 56 F.Supp. 585 (D.Mi. 1944) 29

Illinois Central R.R. Co. v. *Mulberry Hill Coal Co.*, 238 U.S. 275 (1915) 19, 33

In Re Rules and Regulations Nos. 31 and 32, 225 N.W.2d 401 (Ne. 1975) 27

Interstate Commerce Comm. v. *Atlantic Coast Line Co.*, 383 U.S. 576 (1966) 19, 22, 26, 31

I.C.C. v. *Baltimore & Annapolis R.R. Co.*, 398 F.Supp. 454 (D.Md. 1975), aff'd. 537 F.2d 77 (4th Cir.), cert. denied, 429 U.S. 859 (1976) 32

I.C.C. v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184 (1975) 17

Landreth v. *Wabash R. Co.*, 153 F.2d 98 (7th Cir. 1946), cert. denied, 328 U.S. 855 (1946) 30

Loomis v. *Lehigh Valley R.R. Co.*, 240 U.S. 43 (1916).. 32

Louisville & N.R. Co. v. *Brashear*, 289 S.W. 1094 (Ky. 1927) 27

Midland Valley RR. Co. v. *Barkley, et al.*, 276 U.S. 482 (1927) 32, 33

Missouri-Kansas-Texas Railroad Company Abandonment Between Altos and Forgan, Oklahoma, 338 ICC 728 (1971) 28

Missouri Pacific R.R. Co. v. *Stroud*, 267 U.S. 404 (1925) 13, 18, 19, 20, 22, 26

Morrisdale Coal Co. v. *Pennsylvania R.R. Co.*, 230 U.S. 304 (1912) 32

Myers v. *Arkansas and Ozarks Railway Corp.*, 185 F.Supp. 36 (W.D. Ark. 1960) 16

PAGE

Pennsylvania R.R. Co. v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915) 19, 33

Pennsylvania R.R. Co. v. *Sonman Shaft Coal Co.*, 242 U.S. 120 (1916) 19, 33

Peoria & P.U.R. Co. v. *United States*, 263 U.S. 528 (1923) 17

Powell v. *United States*, 300 U.S. 276 (1937) 13, 17, 19, 22, 26

Rice v. Sante Fe Elevator Corp., 331 U.S. 218 (1946) .. 12

Seatrain Lines, Inc. v. *Pennsylvania R. Co., et. al.*, 207 F.2d 255 (3d Cir. 1953) 30

S.H. & W. Lumber Co. v. *California & O.C. R.R.*, 154 F.Supp. 152 (D.Or. 1957) 17

Sibia Corp. v. *Weinberger, Secretary of Health, Education and Welfare, et al.*, 412 U.S. 640 (1973) 31

Spence v. *Baltimore & Ohio Railroad Company*, 360 F.2d 887 (7th Cir. 1966) 33

Texas & Pacific Railway Company v. *Abilene Cotton Oil Company*, 204 U.S. 426 (1906) 21, 22, 23

Texas & P. R.I. v. *Gulf C. & S.F. Ry.*, 270 U.S. 266 (1926) 17

T.I.M.E. v. *United States*, 359 U.S. 464 (1959) 21, 23

Transit Commission v. *United States*, 289 U.S. 121 (1932) 13, 14, 16, 26

United States v. *New River Company*, 265 U.S. 533 (1923) 13, 18, 20, 32

United States v. *State of South Dakota*, 212 F.2d 14 (8th Cir. 1954) 30

United States v. *Utah Constr. and Mining Co.*, 384 U.S. 394 (1966) 29

PAGE

CONSTITUTIONAL PROVISIONS AND STATUTES

Interstate Commerce Act:

(Title 49 U.S.C. was revised by Public Law 95-473, October 17, 1978, without substantive change. (49 U.S.C. § 10101, et. seq.) Since all cases cited in this brief refer only to the pre-revision section headings, the argument in this brief also refers to those section headings. The pre-revision sections are correlated here with the sections of the new revised Act.)

Pre-revision Act	*Revised Act*
49 U.S.C. §1, et seq.	§10101, et seq. 13, 18
49 U.S.C. §1(10)	§10102 .....18, 20
49 U.S.C. §1(11)	§11121 .....13, 18, 20
49 U.S.C. §1(17)(a)	§§11901 and 10501 ..25, 33
49 U.S.C. §1(18)	§§10901, 10902, and 10907 .....13, 17
49 U.S.C. §1(20)	§§11702 and 11704 ..13, 17
49 U.S.C. §8	§11705 ..... 1[illegible]
49 U.S.C. §9	§11705 .....18, 22, 26
49 U.S.C. §20(11)(proviso)	§10103 12
49 U.S.C. §20(11)	§§11707 and 10730 12
49 U.S.C. §22(proviso)	§10103 .....21, 22, 23, 24

49 U.S.C.A. § 1(4), Historical Notes 13

49 U.S.C.A. § 1(11), Historical Notes 13, 20

49 U.S.C.A. § 1(18), Historical Notes 13

49 U.S.C.A. § 1(20), Historical Notes 13

Code of Iowa, 1973

§ 479.3 .....10, 15

§ 479.122 10

Constitution of the United States, Article I, Section 8 ("Commerce Clause") 11

Constitution of the United States, Article VI, Clause 2 ("Supremacy Clause") 30

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1336

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

On Certiorari to the Supreme Court of the United States.

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the District Court of the State of Iowa in and for Webster County, filed July 29, 1977, are unreported and appear at Appendix pages 12a-33a.

The opinion of the Iowa Court of Appeals, filed October 18, 1979, is unreported and appears at Appendix pages 2a-12a.

The Order of the Supreme Court of Iowa, filed November 30, 1979, is unreported and appears at Appendix page 1a.

JURISDICTION

The Order of the Supreme Court was rendered on November 30, 1979, and is final. This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 USC §1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The state statutes involved are §479.3, Code of Iowa, 1973, and §479.122, Code of Iowa, 1973. The federal statutes involved are the Interstate Commerce Act, 49 U.S.C. §1, et seq., and more particularly 49 U.S.C. §1(4), (10), (11), (13), (14), (17), (18), and (20); §8; and §9. Article VI, Clause 2 ("Supremacy Clause"), of the Constitution of the United States is also involved. (Appendix pp. 42a-52a.)

STATEMENT OF THE CASE

On April 4, 1973, the Chicago and North Western Transportation Company ("Transportation Company") ceased operating trains over its branch line to Kalo Brick & Tile Company's ("Kalo") plant site. On November 14, 1973, the Transportation Company applied to the Interstate Commerce Commission, pursuant to the provisions of the Interstate Commerce Act, 49 USC § 1(18), for a certificate of public convenience and necessity authorizing it to abandon its line to Kalo. On September 13, 1974, Kalo filed a petition in the Iowa District Court for Webster County seeking $350,000 in damages from the Transportation Company for alleged destruction of Kalo's business. (Joint App. p. 77-78).[1]

The petition, as amended, claims damages based on three state law theories: (1) violation of § 479.3, Iowa

---

[1] Pursuant to Rule 30 of the Rules of the Supreme Court for the United States, items already reproduced in the appendix filed as part of the Petition for certiorari have not been reproduced in the Joint Appendix. Matters contained in the appendix to the petition for certiorari are cited in this brief as :(Appendix p. 1a.) Matters contained in the Joint Appendix are cited in this brief as: (Joint App. p. 77.) The appendix contains pages 1a-76a. The Joint Appendix commences with page 77.

Code, 1973, requiring rail carriers to furnish suitable cars to shippers; (2) violation of § 479.122, Iowa Code, 1973, rendering rail carriers liable for damages caused by their negligence; and (3) common law tortious interference with contractual relationships between Kalo and its customers. (Joint App. pp. 77-81; Appendix p. 51a-52a.)[2]

On April 30, 1976, the Commission entered an order permitting abandonment that was affirmed by the Commission's order entered September 23, 1976. (Appendix p. 33a-41a.)

Trial of Kalo's claims commenced October 19, 1976, and ended October 26, 1976.[3] The trial court's Findings of Fact, Conclusions of Law, and Judgment, filed July 29, 1977, dismissed all of Kalo's claims on the grounds that the trial court did not have subject matter jurisdiction, and that in any event the Commission had in prior proceedings decided issues adversely to Kalo that were determinative of all of Kalo's claims and Kalo was collaterally estopped from relitigating those issues. (Appendix p. 12a-33a.)

---

[2] The Transportation Company answered that Kalo's sole remedies were under 49 USC § 1, et seq., and that the state court did not have subject matter jurisdiction. (Appendix p. 56a and 64a.)

[3] On November 2, 1976, the Transportation Company filed a Motion to Dismiss stating that pursuant to stipulation of record the Motion would be treated as though it was first made at the close of Plaintiff's evidence and renewed at the close of all the evidence, and raising the defenses of collateral estoppel based on the prior Commission proceedings, lack of subject matter jurisdiction because of the preemption of state law by the Interstate Commerce Act, and lack of subject matter jurisdiction because the issues fell within the primary jurisdiction of the Commission. (Appendix p. 68a-76a.)

The Court of Appeals of Iowa reversed the trial court and remanded for a new trial, holding that the trial court had jurisdiction but not clearly addressing the res judicata/collateral estoppel issue.[4] (Appendix p. 12a.)

The Transportation Company filed with the Iowa Supreme Court an Application for Further Review of the Decision of the Court of Appeals.[5] The Iowa Supreme Court refused to grant further review of the decision of the Court of Appeals. (Appendix p. 1a.)

The facts of the case are as follows:

Prior to April, 1973, the Transportation Company operated trains over a five mile branch line running from Fort Dodge, Iowa, to Kalo. Kalo was the only shipper on the line in 1973, and used the line exclusively for interstate commerce. (Trial Court Opinion, Appendix p. 13a; Testimony of Jerry Schnurr, Appendix p. 33a.) In 1966-1967 earth slides occurred and portions of the Transportation Company's branch line disappeared into the Des Moines River. In order to continue providing trains to Kalo the Transportation Company leased a portion of the

---

[4] In Divisions I, II, and III of its Brief to the Court of Appeals the Transportation Company argued that Kalo was collaterally estopped because of the prior Commission proceedings and that the state court lacked subject matter jurisdiction because of the preemption of state law and because the Commission had primary jurisdiction.

[5] In § 2(a), 2(b), and 3 of its Application for Further Review the Transportation Company raised the defenses of lack of subject matter jurisdiction because of the preemption of state law and because the Commission had primary jurisdiction, and also argued that Kalo was collaterally estopped by the prior Commission proceedings.

Fort Dodge, Des Moines & Southern Railway line. (Trial Court Opinion, Appendix p. 14a-15a.)

During the first few days of April, 1973, earth slides occurred along many points of the line leading to Kalo. On April 4, 1973, the Transportation Company notified Kalo that it could no longer send trains to Kalo's plant site because the line was physically impassable. The Transportation Company then provided cars to Kalo at its Fort Dodge, Iowa, station about five miles from Kalo's plant. (Trial Court Opinion, Appendix p. 15a.)

On April 18, 1973, Kalo notified its customers that it was going out of business but would fulfill its existing contracts. (Trial Court Opinion, Appendix 15a.)

Between April 4, 1973, and April 25, 1973, a decision was made by the Transportation Company that it could not maintain safe rail passage over the tracks leading to Kalo and that line was taken out of service by the Transportation Company's road master. The Transportation Company concluded that it could not stabilize the alignment of the tracks but it made no decision at that time as to whether it would attempt to abandon service to Kalo. (Trial Court Opinion, Appendix p. 15a-17a.)

In August, 1973, Kalo stopped production, sold its inventory, and disposed of its assets. (Trial Court Opinion, Appendix p. 17a.)

On November 14, 1973, the Transportation Company applied to the Commission for permission to abandon its line to Kalo. Kalo filed objections to the abandonment and otherwise participated in the abandonment proceed-

ings.[6] After some delay,[7] on April 30, 1976, the I.C.C. entered an order making the following findings of fact:

> "that the cost of rehabilitation of the applicant's line is estimated to be in excess of $150,000; that the cost of rehabilitation of the leased track is estimated to be in excess of $100,000; that, due to the soil condition and mining activities in the area, the repairs would not be sufficient to insure continuous operations on the line . . . That THE CESSATION OF SERVICE OCCURRED BECAUSE OF CONDITIONS OVER WHICH APPLICANT HAD NO CONTROL, NOT BECAUSE OF WILLFUL ABANDONMENT . . . and that, under these circumstances, continued operation of the line would be an unnecessary burden on Applicant and on Interstate Commerce . . ." (Emphasis supplied) (Appendix p. 35a.)

The order provided for issuance of an appropriate certificate of abandonment. Upon Kalo's petition for reconsideration the April 30, 1976, order was affirmed by the I.C.C. in its order entered September 23, 1976. (I.C.C. Orders, Appendix p. 33a-41a.) No appeal was filed.

The trial court made findings of fact that the branch line was built on an unstable area having slopes that were

---

[6] See: I.C.C. Orders, Appendix p. 33a-41a; I.C.C. proceedings, Record Def. Ex. YYY, Exhibit Appendix filed in Iowa Supreme Court, p. 19-85, and transmitted with Record to Supreme Court of United States.

[7] The delay resulted because this was the period in which the Commission was wrestling with the problem of how to proceed with abandonment applications in light of the decision in *Harlem Valley Transportation Association* v. *Stafford,* 500 F.2d 328, 335-336 (2nd Cir. 1974), holding that an environmental impact statement must be drafted and other requirements of the National Environmental Policy Act, 42 USC § 4321-4347, must be met before the Commission could permit abandonment of a railroad line.

moving, that there has been a long history of slides on the line, and that "the reason this line was removed from service was because of the slides which were taking place along many points of the line . . ." (Trial Court Opinion, Appendix p. 16a.)

SUMMARY OF ARGUMENT

I.

Kalo has sued the Transportation Company for destruction of Kalo's business, alleging violation of a state law requiring carriers by rail to provide car service to shippers, negligent maintenance of its branch line resulting in cessation of rail service to Kalo's plant site, and intentional cessation of rail service to Kalo's plant site that constitutes intentional and tortious interference with contracts between Kalo and its customers. The factual basis of each of Kalo's theories of recovery is the cessation of rail service to Kalo's plant site and the substituted practice of providing rail service to Kalo at the Fort Dodge, Iowa, rail station located five miles from Kalo's plant. Each of Kalo's three theories is predicated upon the existence under the circumstances of a duty on the part of the Transportation Company to continue providing rail service to Kalo's plant site. Kalo pleaded, and the evidence was undisputed, that Kalo's shipments by rail were in interstate commerce.

Cessation of service over the branch line occurred because the line became physically impassable. A railroad car service statute cannot apply to the facts of this case because issues of car service presuppose the existence of a physically operable line of railroad. This line was embargoed when it became impassable and the only possible

claim Kalo can have would be one charging unlawful abandonment. The Interstate Commerce Act has preempted state law and state court jurisdiction in the area of railroad line abandonments and extensions. The Interstate Commerce Commission ruled before trial of Kalo's claims that the cessation of service over the line was due to physical conditions and mining activities beyond the Transportation Company's control. Kalo was a party to the Commission abandonment proceedings and did not appeal the ruling.

Even if this case is one involving car service issues rather than railroad line abandonment issues, the ICC Act governs and preempts state law in the area. All of Kalo's rail shipments were in interstate commerce and state law is invalid to the extent it affects interstate commerce. The ICC Act permits actions for violation of the duty to provide interstate car service to be brought only before the Commission or in Federal District Court.

Kalo's negligence and tortious interference claims, as well as its state law car service claim, fall if there was no duty to provide interstate rail or car service under the circumstances. Absent such a duty, a negligent or intentional failure to provide interstate rail or car service could not create liability. The ICC Act provisions on abandonment and car service control the determination of whether there was any duty to continue providing rail or car service and those provisions preempt state law in the area. State courts have no jurisdiction to entertain damage actions for violations of the ICC Act abandonment or car service provisions.

II.

The factual basis for all of Kalo's claim is the allegation that the Transportation Company either intentionally, unreasonably, or negligently failed to provide Kalo with rail service. That issue was decided adversely to Kalo in a proceeding to which Kalo was a party, where the Interstate Commerce Commission found that the cessation of service occurred because of physical conditions beyond the Transportation Company's control. The Commission having ruled, Kalo should not be allowed to relitigate the issue in a court of original jurisdiction.

III.

The primary jurisdiction doctrine requires that questions calling for the application of uniform national standards of rail transportation policy must first be presented to the Interstate Commerce Commission. It is well established that whether an interstate railroad is providing an adequate level of service to its shippers is such a question. Accordingly, the state court must defer to the Commission on the central issue of whether the Transportation Company's cessation of service was unlawful. The Commission has already ruled and the issue should be closed.

ARGUMENT

I.

THE INTERSTATE COMMERCE ACT HAS PREEMPTED THE POWER OF COURTS OVER RAIL CARRIERS IN INTERSTATE COMMERCE IN MATTERS OF RAILROAD LINE ABANDONMENT AND PROVISION OF CAR SERVICE OVER THOSE LINES.

The Iowa Court of Appeals erroneously held that the State District Court for Webster County has subject matter jurisdiction to decide whether a rail carrier may be subject to damages for conduct found by a federal agency to be lawful.

Kalo has sued the Transportation Company under three theories. In Kalo's original petition (filed September 13, 1974) it alleged the Transportation Company failed to furnish railway cars or send trains to Kalo's plant site and thereby violated §479.3, Code of Iowa, 1973, requiring railways to "furnish suitable cars to any and all persons who may apply therefore. . . ." (Petition, Paragraph 5, Joint App. p. 78.)

In its Amendment to Petition (filed April 28, 1976) Kalo added two new theories. First, Kalo alleged the Transportation Company caused the track to fail because it was negligent in maintaining the roadbed and that as a result the Transportation Company was "no longer able to provide service to this Plaintiff as required by the laws and statutes of the State of Iowa." (Amend. to Petition, Paragraph 8 of Division II, Joint App. p. 79.) Kalo has contended that such alleged conduct renders the Transportation Company liable for damages for destruction of Kalo's business under §479.122, Code of Iowa,

1973, making any railway liable for "damage sustained by any person . . ." because of the negligence of the railway. The second new theory added by the Amendment to Petition also alleged the Transportation Company was "no longer able to provide service to this Plaintiff as required by the laws and statutes of the State of Iowa . . .", and further charged that the Transportation Company had tortiously interfered with contracts between Kalo and customers in states other than Iowa. (Amend. to Petition, Paragraph 8 and Paragraph 10 of Division III, Joint App. p.78,80.) Kalo has never claimed the Transportation Company violated any federal statute or regulation.

All three theories pleaded by Kalo allege that Kalo ". . . made clay products for sale and shipment by railroad to different parts of the United States. . . ." (Petition, Paragraph 3, Joint App. p.77; Amend. to Petition, Paragraph 3 of Division II and Paragraph 3 of Division III, Joint App. pp.79,80). The undisputed, and only, evidence on the character of the commerce involved came from the testimony of a corporate officer of Kalo (Jerry Schnurr) who said Kalo's intrastate shipments were made by truck and the only use of rail transportation was for shipments in interstate commerce. (Appendix p. 33a). The trial court affirmed this fact. (Trial Court Opinion, Appendix p.13a.)

It has long been recognized that under the Commerce Clause of the Constitution of the United States (Article 1, §8), Congress may enact laws affecting interstate commerce that preempt state law relating to the same subject area. *Gibbons* v. *Ogden,* 22 U.S. (9 Wheaton) 1, 209-211, 221 (1824). The determination of whether state law has been preempted depends upon whether preemption was the purpose of Congress when it enacted the federal

legislation. *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1946). Several methods by which the Court can ascertain such a purpose on the part of Congress were set out in *Rice* v. *Sante Fe Elevator Corp., supra,* at 230:

> "Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state's policy may produce a result inconsistent with the objective of the federal statute. . . ." (citations omitted)

Clearly, state statutes and common law are preempted when they are inconsistent with federal law. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheaton) 1, 209-211, 221 (1824); *Rice* v. *Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1946). Likewise, where the purpose of Congress in legislating in an area is to secure uniformity of standards and principles of decision in that area, state law that supplements or complements federal regulation "is as fatal as state regulations which conflict with the federal scheme". *Campbell* v. *Hussey,* 368 U.S. 297, 302 (1961); *Charleston & W.C.R. Co.* v. *Varnville Furniture Co.,* 237 U.S. 597, 604 (1915).[8]

---

[8] In *Charleston & W.C.R. Co.* v. *Varnville Furniture Co., supra,* at 604, the Court stated with regard to a state statute held preempted by the federal rail freight loss and damage statute (Carmack Amendment, 49 U.S.C. (1970 ed.) §20(11)):

> "When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as oppo-

The Interstate Commerce Act, 49 U.S.C. (1970 ed.) §1, et. seq.[9], has preempted state statutes and common law in the field of railroad line abandonment. *Powell* v. *United States,* 300 U.S. 276, 287 (1937); *Transit Commission* v. *United States,* 289 U.S. 121, 126-129 (1932). The Act has also preempted state law in the field of provision of car service. *Missouri Pacific RR. Co.* v. *Stroud,* 267 U.S. 404, 407-408 (1925); *United States* v. *New River Company,* 265 U.S. 533, 541-542 (1923); *Hampton* v. *St. Louis, Iron Mountain and Southern Ry. Co.,* 227 U.S. 456, 465 (1912); *Chicago, Rock Island and Pac. Ry. Co.* v. *Hardwick Farmers Elevator Co.,* 226 U.S. 426, 433 (1912). All of Kalo's claims are predicated upon the existence of a duty on the part of the Transportation Company to provide interstate rail service to Kalo's plant site. State law and state court jurisdiction have been preempted in this area by the ICC Act, 49 U.S.C. (1970 ed.)

The Transportation Act of 1920, by adding new sections and by amending the 1917 Esch Car Service Act specifically granted the Commission jurisdiction over car service and railroad line abandonments and extensions in interstate commerce. 49 U.S.C.A. (1959 ed.) §§1(4), 1(11), 1(18), and 1(20), Historical Notes, pp. 67, 117, 147 and 168. The Transportation Act of 1920 greatly expanded the control of the Commission over the nation's railroads

---

[8] (Continued)

sition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."

[9] Title 49, U.S.C. was revised by Public Law 95-473, October 17, 1978. 49 U.S.C. §10101, et. seq. The section headings of the new revised Act are correlated with the section headings of the pre-revision Act in the table of citations, supra. In the body of the argument, citations will be to the pre-revision Act, since all cases cited refer to the pre-vision sections.

for the purpose of enabling the Commission to regulate capital expenditures for rail lines, car supply and distribution, and rates. The concept of the 1920 Act was explained in *Dayton-Goose Greek Railway Company* v. *United States,* 263 U.S. 456 (1923), at 478:

> "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad system of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

In *Transit Commission* v. *United States,* 289 US 121, 126-129 (1932), the Court commented upon the historic necessity for preemptive federal legislation governing, and exclusive Interstate Commerce Commission authority over the subject of railroad line abandonments and extensions:

> "These provisions do not specifically mention trackage agreements providing for joint use of railroad lines, tracks or other facilities by two or more carriers. The question is whether the general language of paragraph (18) includes the arrangement

under consideration. Prior to the Tarnsportation Act, 1920, regulations coincidentally made by federal and state authorities were frequently conflicting, and often the enforcement of state measures interfered with, burdened and destroyed interstate commerce. Multiple control in respect of matters affecting such transportation had been found detrimental to the public interest as well as to the carriers. Dominant federal action was imperatively called for. Minnesota Rate Cases (Simpson v. Shepard) 230 U.S. 352, 433, 57 L. ed. 1151, 1555, 33 St. Ct. 729, 48 L.R.A. (N.S.) 1151, Ann. Cas. 1916A, 18. And it was everywhere known that enormous sums had been expended by interstate railroad carriers for the construction and operation of lines that were not needed or likely to be needed. Such investments had brought financial ruin to some and had made doubtful the power of many to continue operation in other than flush times. Need for effective regulation in this field had become urgent, and undoubtedly the Congress, by the provisions above referred to, intended to confer upon the Commission plenary power to limit interstate carriers' expenditures for construction or operation to lines of railroad reasonably necessary for the service of the public.

. . . The Act, including paragraph (18) and related provisions, is construed to make federal authority effective to the full extent that it has been exerted and with a view of eliminating the evils that Congress intended to abate. (citations omitted)

. . . On the taking effect of the Transportation Act the state commission was stripped of power to prescribe terms for such operation. The authority of the Interstate Commerce Commission is paramount and, in respect of the operation and agreement under consideration, it is necessarily exclusive."

In its original petition Kalo claimed the facts of this case give rise to an action for damages for violation of a state ralroad car service statute, §479.3, Code of Iowa,

1973. Since Kalo commenced its action in state court, it had no choice but to characterize this as a car service case because there are no Iowa statutes concerning abandonment of lines and in any event federal law has clearly preempted state law in the area of railroad line abandonment and extensions. *Transit Commission* v. *United States,* 289 U.S. 121, 126-129 (1932).

However, this is not a case involving failure to provide car service, for car service issues presume the physical ability to move cars over a line. (Trial Court Opinion, Appendix p. 21a.) That is, car service issues presume the existence of a physically operable line of railroad. No such line existed in this situation and the Commission found that the absence of a physically operable line did not result from any unlawful act of the Transportation Company. The Commission further found, in an unappealed order, that the cessation of service was not unlawful. (Appendix p. 35a-36a.) In this case the Transportation Company lawfully imposed an embargo and took its line out of service because of physical conditions, and gave required notice to Kalo, the only shipper on the line. (Trial Court Opinion pages 3-6, Appendix p. 15a.) The practice of instituting embargoes when lines become physically inoperable is well recognized. *Chicago and North Western Ry. Co.* v. *Union Packing Co.,* 373 F.Supp. 734, 736-737 (D. Ne. 1974); *Myers* v. *Arkansas and Ozarks Railway Corp.,* 185 F. Supp. 36, 41-42 (W.D. Ark. 1960); *Asbury* v. *Chesapeake & Ohio Railway Company,* 314 F. Supp. 310, 312-313 (D.D.C. 1970).[10]

---

[10] Also, see, *General Foods Corporation* v. *Baker,* 451 F.Supp. 873, 876-877 (D. Md. 1978); *Holt Motor Company* v. *Nicholson Universal S.S. Co.,* 56 F.Supp. 585, 590-592 (D. Mi. 1944); and see, *Eastern Railway Co.* v *Littlefield,* 237 U.S. 140, 144-145 (1915).

"'Car service' connotes the use to which vehicles of transportation are put; not the transportation service rendered by means of them." *Peoria & P. U. R. Co.* v. *United States,* 263 U.S. 528, 533 (1923); *I.C.C.* v. *Oregon Pacific Industries, Inc.,* 420 U.S. 184, 189 (1975). Car service statutes do not apply where freight service over a branch line is discontinued and abandoned. *Burlington Northern* v. *Department of Public Service,* 240 N.W.2d 554, 558-559 (Mn. 1976).

This case is obviously one whose issues must be decided under the federal law governing railroad line abandonments, rather than the state law governing car service, negligence, or tortious interference actions. Yet the Iowa Court of Appeals refused to even address the question of whether this case was one dealing with abandonment issues and was consequently a case in which the ICC Act preempted State law. (Iowa Court of Appeals Opinion, Appendix p. 12a.)

The line was lawfully abandoned pursuant to an order of the Interstate Commerce Commission entered before trial and judgment in this action. (Trial Court Opinion Appendix p. 27a-30a; Def. Exhibit YYY, Appendix p. 33a-40a.) An "abandonment" of a rail line is governed exclusively by the provisions of the Interstate Commerce Act, 49 U.S.C. (1970 ed.) §§1(18) and 1(20), and a suit for injunction in federal district court under 49 U.S.C. (1970 ed.) §1(20) affords the only remedy for unlawful abandonment of a line. *Powell* v. *United States,* 300 U.S. 276, 287 (1937).[11]

---

[11] Also see: *Texas & P. R.I.* v. *Gulf C. & S.F. Ry.,* 270 U.S. 266, 272-273 (1926); *S.H. & W. Lumber Co.* v. *California & O.C. R.R.,* 154 F.Supp. 152, 154 (D. Or. 1957); *Asbury* v. *Chesapeake & O. Ry.,* 314 F.Supp. 310, 312 (D.D.C. 1970). *Contra, Ethan Allen, Inc.* v. *Maine Central Railroad Co.,* 431 F.Supp. 740 (D.Vt. 1977).

Even if this case involved an unlawful abandonment, which the Commission specifically found not to be the case, Kalo would have to bring its action in Federal District Court or before the Commission. 49 U.S.C. (1970 ed.) §9. There are no Iowa statutes providing any remedy for abandonment of rail lines. (Trial Court Opinion, Appendix p. 23a.) Kalo never sought an injunction or damages in Federal District Court or before the Commission.

To reach issues of car service, it must be assumed that a physical line exists, and the Commission determined that a physical line ceased to exist because of conditions beyond the Transportation Company's control. Even if it is assumed, *arguendo,* that this is a car service case, 49 U.S.C. (1970 ed.) §§1, 8, and 9 cover the whole field of railroad car service in interstate commerce and enactment of that federal legislation rendered invalid state statutes and the common law to the extent that they purport to regulate railroad car service in interstate commerce. *Hampton* v. *St. Louis, Iron Mountain and Southern Ry. Co.,* 227 U.S. 456, 465 (1912); *Chicago, Rock Island & Pac. Ry. Co.* v. *Hardwick Farmers Elevator Co.,* 226 U.S. 426, 433, 436 (1912); *Missouri Pacific R.R. Co.* v. *Stroud,* 267 U.S. 404, 407-408 (1925); *United States* v. *New River Company,* 265 U.S. 533, 541-542 (1923).

Indeed, even if a party was claiming damages under 49 U.S.C. (1970 ed.) §1 (11), the car service statute, it could pursue its damage claim only before the Interstate Commerce Commission or in a Federal District Court.[12]

---

[12] This requirement of 49 U.S.C. (1970 ed.) §9 was not discussed in *Chicago, Rock Island & Pac. Ry. Co.* v. *Linwood Stone Products Co.,* 138 N.W.2d 902 (Ia. 1965), or in *Baird Brothers* v. *Minneapolis & St. Louis Railroad Co.,* 181 Iowa 1104, 1123, 165 N.W. 412 (1917), which were relied on by the Iowa Court of Appeals.

49 U.S.C. (1970 ed.) §9; *Interstate Commerce Comm.* v. *Atlantic Coast Line Co.*, 383 U.S. 576, 579 (1966).[13]

The Iowa Court of Appeals erroneously ruled in general terms that Iowa may regulate service in interstate commerce so long as the regulation is not inconsistent with and does not interfere with the provisions of the Interstate Commerce Act. (Court of Appeals Opinion, Appendix p. 8a.) In the context of this case the result of this erroneous ruling is to give a state district court the power to award damages for failure to provide car service where there are unappealed findings by the Commission that the cessation of service was not unlawful.

To support its ruling the Iowa Court of Appeals relied upon a few early cases indicating that state courts have jurisdiction concurrent with the Commission and federal courts to decide claims of failure to provide adequate car service in interstate commerce.[14] However, those cases were decided prior to the Esch Car Service Act (1917) and the Transportation Act of 1920, which clearly evidence the intention of Congress to rest exclusive jurisdiction over provision of interstate car service and railroad line abandonment with the Commission and the federal courts. *Missouri Pacific R.R. Co.* v. *Stroud*, 267 U.S. 404, 407-408 (1925); *Powell* v. *United States*, 300 U.S. 276, 287 (1937); *Transit Commission* v. *United States*, 289 U.S. 121, 126-129 (1932).

---

[13] Also see, *Burlington Northern, Inc.* v. *Department of Public Service*, 240 N.W.2d 554, 559 (Mn. 1976); *Auracher* v. *Omaha & St. L. R. Co.*, 102 F. 1, 2 (Cir. Ct. S. D. Ia. 1900).

[14] The Iowa Court of Appeals mistakenly relied upon *Pennsylvania R.R. Co.* v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915), *Illinois Central R.R. Co.* v. *Mulberry Hill Coal Co.*, 238 U.S. 275 (1915), and *Pennsylvania R. Co.* v. *Sonman Shaft Coal Co.*, 242 U.S. 120 (1916).

49 U.S.C. (1970) ed. §1(11) is the federal statute requiring carriers to provide "adequate car service" to shippers. That paragraph was added to the ICC Act in 1917 (Esch Car Service Act) and was amended by the Transportation Act of 1920. 49 U.S.C.A. (1959 ed.) §1(11), Historical Notes, p. 117; ch. 23, 40 Stat. 101 (1917); ch. 91, §402, 41 Stat. 476 (1920). Since cases decided before these Acts do not address the federal car service statute, they most assuredly do not constitute reliable authority on the issue of whether state power has been preempted by the ICC Act in the area of provision of car service in interstate commerce.

Cases decided after the Transportation Act of 1920 hold that federal statutes have preempted the field of provision of car service in interstate commerce and that state law is invalid in that area. *Missouri Pacific R.R. Co.* v. *Stroud,* 267 U.S. 404, 407-408 (1925); *Unted States* v. *New River Company,* 265 U.S. 533, 541-542, 610 (1923).

In *Missouri Pacific Railroad Company* v. *Stroud,* 267 U.S. 404, 407-408 (1925), a shipper sued a rail carrier in state court charging violation of a state car service statute providing for an award of treble damages against a shipper found to have violated the act. In *Missouri Pacific Railroad Company* v. *Stroud, supra,* at 267 U.S. 407-408, the Court said:

> "Congress in the exertion of its power over commerce among the states, has enacted laws for the regulation of the furnishing of cars to shippers. Interstate Commerce Act §1, (3), (4), (6), (10), (11), (12), (14); §3 (1); §15 (1). See *United States* v. *New River Co.,* 265 U.S. 533, 451, 68 L.Ed. 1165, 1172, 44 Sup. Ct. Reg. 610. . . . The state law has no application to the furnishing of cars to shippers for the

transportation of freight in interstate commerce." (Citations omitted)

The few cases that have permitted concurrent state jurisdiction over provision of interstate car service have cited 49 U.S.C. (1970 ed.) §22 in support of state jurisdiction, but the cases were decided before enactment of comprehensive federal car service and railroad line abandonment legislation. (Transporation Act of 1920 and 1917 Esch Car Service Act).[15] 49 U.S.C. (1970 ed.) §22 is a lengthy provision dealing with rates whose texts includes the following clause:

". . . .and nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. . . ."

The quoted clause appeared in the original ICC Act of 1887, prior to enactment of Congress' comprehensive legislation in the areas of car service and railroad line abandonment. The clause does not operate to create state court jurisdiction in areas where federal legislation has preempted the states. *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Company,* 204 U.S. 426, 404-441, 446-447 (1906); *T.I.M.E.* v. *United States,* 359 U.S. 464, 473-474 (1959); *Adams Express Company* v. *Croninger,* 226 U.S. 491, 504-509 (1912).[16]

---

[15] The cases decided before these acts that permitted concurrent state jurisdiction are set out, *supra,* at note 14.

[16] *Adams Express Company* v. *Croninger, supra* dealt with the Federal freight loss and damage statute (Carmark Amendment, 49 U.S.C. (1970 ed.) §20(11), ch. 3591, §6, 34 Stat. 593 (1906)). In *Adams Express Company* v. *Croninger, supra,* at 504-505, the Court said the purpose of the Carmack Amendment was to end the diversity of principles upon which freight loss damages were awarded

Even before passage of the Transportation Act of 1920 and the Esch Car Service Act, the United States Supreme Court held that state law was invalid to the extent it attempted to regulate the furnishing of railroad cars for interstate shipments. *Chicago, Rock Island and Pac. Ry. Co.* v. *Hardwick Farmers Elevator Co.*, 226 U.S. 426, 433 (1912); *Hampton* v. *St. Louis, Iron Mountain and Southern Ry. Co.*, 227 U.S. 456, 465 (1912). The clause quoted above from 49 U.S.C. (1970 ed.) §22 does not alter the fact that state law clearly is now preempted by the ICC Act in the areas of interstate car service and railroad line abandonment, and no jurisdiction has been preserved in state courts to entertain damage actions in those areas. *Missouri Pacific R.R. Co.* v. *Stroud*, 267 U.S. 404, 407-408 (1925); *Powell* v. *United States*, 300 U.S. 276, 287 (1937); *Transit Commission* v. *United States*, 289 U.S. 121, 126-129 (1932). The ICC Act permits claims only before the Commission or in Federal District Court. 49 U.S.C. (1970 ed.) §9; *Interstate Commerce Commission* v. *Atlantic Coast Line Co.*, 383 U.S. 576, 579 (1966).

Texas & Pacific Railway Company v. *Abilene Cotton Oil Company*, 204 U.S. 426, 440-441, 446-447 (1906), dealt with an action for damages in state court in which a shipper claimed interstate freight rates charged to it

---

[16] (Continued)
in the various states. The Court also said that neither the proviso in §22 of the ICC Act, nor the proviso in §20(11) of the Act preserving ". . . any remedy or right of action which (a shipper) has under existing law. . .", were intended to preserve state law damage claims, since to do so would destroy the uniformity of decision and control sought by the Act. *Adams Express Company* v. *Croninger, supra*, at 507-508. The §22 proviso and the §20(11) proviso were revised in the same section (49 U.S.C. §10103) in the revised Act.

were excessive and unreasonable. The Commission had never ruled the rates unreasonable. The Supreme Court of the United States held that the state court had no jurisdiction over the claim because allowing such a state court damage action would be "wholly inconsistent with the administrative power conferred upon the Commission" and would prevent achieving the uniformity of decision the ICC Act sought. *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company, supra,* at 440-441. In response to the shipper's contention that §22 of the ICC Act saved his state court damage action, the Court stated:

> ". . . This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. . . ." *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company, supra,* at 446-447.

The Court's refusal in *Abilene Cotton* to construe §22 to permit a result that would be inconsistent with other provisions of the Act and the purposes underlying those provisions has been noted with approval in later cases. *T.I.M.E.* v. *United States,* 359 U.S. 464, 473-474 (1959); *Arrow Transportation Company* v. *Southern Railway Company,* 372 U.S. 658, 671, at note 22 (1963).

The United States Supreme Court previously denied certiorari in a case having facts similar to the present case and in which the Court of Appeals for the Ninth Circuit ruled there was no state court jurisdiction. In *Bodine & Clark Livestock Commission Co.* v. *Great Northern Ry. Co.,* 63 F.2d 472, 478 (9th Cir. 1933), cert. denied 290 U.S. 629 (1933), a shipper sued in Federal District Court claiming damages for increased shipping costs it sustained because a rail carrier instituted a new operating practice restricting west-bound interstate shipments of cattle to

one train weekly. While the suit was pending the Interstate Commerce Commission ruled that the carrier's practice was not unreasonable and so did not violate the ICC Act. *Bodine & Clark Livestock Commission Co.* v. *Great Northern Ry. Co., supra,* at 63 F.2d 474. The shipper contended that common law required the carrier to accept and transport livestock with reasonable dispatch, and that 49 U.S.C. §22 preserved the shipper's common law cause of action for damages. Quoting from *Texas & Pacific Railway Company* v. *Abilene Cotton Oil Company, supra,* the Court of Appeals for the Ninth Circuit held that §22 did not preserve the state law action for damages because such an interpretation of §22 would effectively destroy the ICC Act. *Bodine & Clark Livestock Commission Co.* v. *Great Northern Ry. Co., supra,* at 63 F.2d 478.

The same reasoning applies in the present case. The Transportation Company instituted a new operating practice that eliminated some interstate service previously available to Kalo.[17] Under its new operating practice it provided rail cars to Kalo at the Transportation Company's Fort Dodge, Iowa, station, located about five miles from Kalo's plant. As was the case in *Bodine & Clark Livestock,* the new operating practice of the Transportation Company affected interstate rail service and was therefore a matter governed by the ICC Act and not state law. During the pendency of Kalo's state court suit, the Commission ruled the new operating practice had been reasonable under the circumstances and not unlawful. Therefore, as in *Bodine & Clark Livestock Commission Co.* v. *Great Northern Ry. Co., supra;* 49 U.S.C. (1970 ed.) §22 should not be construed in the present case to permit

---

[17] The new operating practice did not increase shipping costs paid by Kalo because it passed the increased costs on to its customers. (Trans. p. 66-67).

a state court damage action because to do so would be directly contrary to the purposes and objectives of the ICC Act and would destroy the administrative power of the Commission.

In 49 U.S.C. (1970 ed.) §1(17)(a) Congress has specifically addressed the extent to which state power over provision of rail service has been preserved, and Congress limited state power in that area to intrastate shipments. 49 U.S.C. (1970 ed.) §1(17)(a) provides:

> "Provided, however that nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this chapter and except as otherwise provided in this chapter."

Nothing in §1(17)(a) authorizes what is happening in the present case. §1(17)(a) does not say and should not be construed to mean that a state may exercise the power to determine whether a carrier is providing reasonable interstate service. Such a construction deprives the limiting word "intrastate" of any meaning.

Each of Kalo's three theories of recovery require a ruling that under the circumstances existing the Transportation Company had a duty to provide rail service at Kalo's plant site for *interstate* shipments. The existence of such a duty on the part of the Transportation Company is obviously required under Kalo's car service theory, since all Kalo's rail shipments were undisputably in interstate commerce. Likewise, assuming *arguendo,* that the Transportation Company negligently or intentionally caused the track to become physically impassable, such con-

duct standing alone could not possibly create any liability on the part of the Transportation Company absent a duty to provide interstate rail service to Kalo's plant site.

Even if this was a "car service" case (which it is not), and even if a state court action for damages for unlawful abandonment was permissible under the ICC Act (which is not the case), it would not be sufficient for Kalo to merely prove in state court that the Transportation Company negligently or intentionally rendered the line of railroad impassable. Kalo would still need a ruling that the negligent or intentional conduct of the Transportation Company breached a *duty to provide interstate rail service* to Kalo's plant site. If under the circumstances existing there was no such duty, Kalo could not recover damages for failure to provide rail service. Clearly, the areas of provision of interstate railroad car service and railroad line abandonment have been preempted by federal law. *Missouri Pacific Railroad Company* v. *Stroud,* 267 U.S. 404, 407-408 (1924); *Powell* v. *United States,* 300 U.S. 276, 287 (1937); *Transit Commission* v. *United States,* 289 U.S. 121, 126-129 (1932). Where federal law preempts state law, an action may not be based upon state law, and it is immaterial that the action is one for damages. *Missouri Pacific Railroad Company* v. *Stroud,* 267 U.S. 404, 407-408 (1924) (action for treble damages based on state car service statute not permissible where shipments are interstate). Thus, an action grounded upon the issue of whether a rail carrier has a duty to provide interstate rail service can only be pursued under the ICC Act and only before the Commission or in Federal District Court. *Interstate Commerce Comm.* v. *Atlantic Coast Line Co.,* 383 U.S. 576, 579 (1966); 49 U.S.C. (1970 ed.) §9.

The interstate commerce operations of rail carriers should be treated uniformly in all states, including Iowa.[18] The Iowa Supreme Court decision in the present case allows an Iowa State District Court to penalize a rail carrier by awarding damages for failure to expend substantial capital funds to reconstruct a railroad line running to Kalo's plant site for the purpose of improving Kalo's interstate rail service.[19] This ruling, if not overturned, allows state courts to regulate interstate rail service by

---

[18] The exclusive domain of Federal statutes in the area of regulation of railroad car service and line abandonments and extensions in interstate commerce has been recognized by the high courts of states other than Iowa. *In Re Rules and Regulations Nos. 31 and 32,* 225 N.W.2d 401, 408 (Neb. 1975); *Burlington Northern, Inc.* v. *Department of Public Service,* 240 N.W.2d 554, 556-559 (Mn. 1976); *Chicago, M., St. P. & P. R. Co.* v. *Michigan Pub. Serv. Commission,* 50 N.W.2d 884, 887 (Mi. 1952); *Davis* v. *Keystone Steel & Wire Co.,* 148 NE 47, 50-51 (Ill. 1925); *Louisville & N.R. Co.* v. *Brashear,* 289 S.W. 1094, 1098-1099 (Ky. 1927). It has been held that 49 U.S.C. §§1(10) and 1(11), as administered by the I.C.C., govern whether the frequency of service may be reduced on a branch line carrying 82.1% interstate traffic. *Burlington Northern, Inc.* v. *Department of Public Service, supra,* at 240 N.W.2d 557-558. The Supreme Court of Michigan has ruled that a state regulatory agency has no power to require a rail carrier to operate an unprofitable line which, although it would have benefited intrastate commerce, was primarily intended to improve interstate rail service afforded to the area in question. *Chicago, M., St. P. & P. R. Co.* v. *Michigan Public Service Commission, supra,* at 50 N.W.2d 887.

[19] In *Charleston & W.C.R. Co.* v. *Varnville Furniture Co.,* 237 U.S. 597, 603-604 (1915), the Court said that a state freight damage law imposing a fifty dollar penalty was a burden on interstate rail service but that in any event the fact of the burden was immaterial because Congress had enacted legislation that preempted state law in the area.

penalty. In the present case this ruling also allows a state court to overrule a prior decision of the Interstate Commerce Commission on issues concerning interstate commerce (Section II infra).

II.

ISSUES DETERMINATIVE OF KALO'S CLAIMS WERE DECIDED IN A VALID FINAL JUDGMENT OF THE COMMISSION IN THE KALO LINE ABANDONMENT PROCEEDINGS TO WHICH BOTH THE TRANSPORTATION COMPANY AND KALO WERE PARTIES.

The essential question to be resolved by the Commission in any abandonment proceeding where the condition of a line is in issue is whether that condition is due to a railroad's neglect or to circumstances beyond the railroad's control. *Missouri-Kansas-Texas Railroad Company Abandonment Between Altos and Forgan, Oklahoma,* 338 ICC 728, 743-748 (1971).

In the Kalo Line Abandonment Proceedings, the Commission explicitly held that the cessation of service on the line serving Kalo occurred ". . . because of conditions over which applicant had no control, not because of willful abandonment. . .", and that ". . . due to the soil condition and mining activities in the area, the repairs would not be sufficient to ensure continued operations on the line. (I.C.C. Order entered April 30, 1976, Appendix p. 35a.))

These factual findings negate the basis for any of Kalo's state law claims, and were clearly material to the issuance of the certificate of Abandonment. Kalo claims damages for failure to furnish car service, negligent maintenance of the line serving Kalo, and tortious interference by the Transportation Company with Kalo's contractual relations. All three claims necessarily imply that the Transportation Company either unreasonably or negli-

gently failed to provide cars or rail service to Kalo and maintain its line of track, or intentionally injured Kalo by failing to provide cars or rail service and maintain its line of track. The Commission stated that in fact the cessation of service occurred because of conditions beyond the Transportation Company's control, not because of negligence or malevolent intent.

Kalo's attempted relabeling of its claims in state law terms has no effect on the Commission factual findings; "the . . . statutory scheme would be too easily avoided if a party could compel relitigation of a matter once decided by a mere exercise of semantics." *United States* v. *Utah Constr. and Mining Co.*, 384 U.S. 394, 419 (1966).

The Transportation Company's duty to furnish car service to Kalo under Section 479.122 of the 1973 Iowa Code was not absolute, even if the statute provided no express exceptions or defenses to the duty. Interpreting such a statute in *Hampton* v. *St. Louis, Iron Mountain and Southern Railway Company*, 227 U.S. 456 (1912), this Court held that a railroad's duty to provide car service is not absolute and that ". . . any reasonable excuse for a failure to furnish cars upon the requirements of a shipper, may be interposed." *Hampton* v. *St. Louis, Iron Mountain and Southern Railway Company, supra*, at 227 U.S. 466.

The Court further stated:

> "The cases referred to make it clear that the statutory duty of furnishing cars upon the reasonable notice of a shipper is not absolute, and that the legislature did not intend to impose upon railroad companies the duty of furnishing cars to a particular shipper regardless of its equal duty to other shippers, state and interstate, or to a situation *due to some unusual and unavoidable condition which made it un-*

reasonable that it should be penalized for noncompliance. . ." (Emphasis supplied)
227 U.S. 456, 468.

The Commission found such an unusual condition and found it unreasonable to penalize the Transportation Company for that condition. (I.C.C. Order entered April 30, 1976, Appendix p. 34a-36a.)

Where the elements of collateral estoppel are present, a determination of factual issues by the Interstate Commerce Commission precludes relitigation of the issues. Constitution of the United States, Article VI, Clause 2 ("Supremacy Clause"); *Baltimore & Ohio Railroad Company, et al.* v. *New York, New Haven & Hartford Railroad Company,* 196 F.Supp. 724, 744-745 (S.D.N.Y. 1961); *Seatrain Lines, Inc.* v. *Pennsylvania R. Co., et al.,* 207 F.2d 255, 259 (3d Cir. 1953).[20]

All the elements of collateral estoppel are present. (Trial Court Opinion, Appendix p. 27a-30a.) Kalo was a party to the abandonment proceeding. Since any state claims it may have had arose at or before the time of the proceeding, Kalo knew that the issue of the abandonment would be important in potential future litigation. It had a full and fair opportunity to litigate the abandonment before the I.C.C. and did so. The issues precluded by the I.C.C. findings were material to all of Kalo's state law claims. The Transportation Company's abandonment was found to be reasonable, unintentional, and free of negligence. Kalo could have taken advantage of statutory

---

[20] Also, see *Board of Supervisors, Carroll County* v. *Chicago and North Western Transportation Company,* 260 N.W.2d 813, 815 (Ia. 1977); *United States* v. *State of South Dakota,* 212 F.2d 14, 16 (8th Cir. 1954); *Landreth* v. *Wabash R. Co.,* 153 F.2d 98, 100 (7th Cir. 1946), cert. denied, 328 U.S. 855, 55 S.Ct. 1345, 90 L.Ed 1627 (1946).

provisions for appeal of the Commission findings, but did not do so. Kalo should not be allowed to relitigate the issue in a court of original jurisdiction. *Siba Corp.* v. *Weinberger, Secretary of Health, Education and Welfare, et al.*, 412 U.S. 640 (1973).

III.

THE INTERSTATE COMMERCE COMMISSION HAS PRIMARY JURISDICTION OVER ISSUES NECESSARY TO THE PROOF OF KALO'S CLAIMS.

"National rather than local control of interstate railroad transportation has long been the policy of Congress." *Chicago* v. *Atchison, Topeka & Sante Fe R. Co.*, 357 U.S. 77, 87 (1958). The Interstate Commerce Commission has primary, jurisdiction over "issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the] Act." *Interstate Commerce Comm.* v. *Atlantic Coast Line Co.*, 383 U.S. 576, 579 (1966). If an action for damages in Federal District Court involves issues that fall within the primary jurisdiction of the Interstate Commerce Commission, those issues must be referred to the Commission for determination. *Interstate Commerce Comm.* v. *Atlantic Coast Line Co.*, 383 U.S. 576, 579 (1966). There is no mechanism allowing referral of issues from a state court to the Commission.

Assuming *arguendo* that this is a car service case and that a state court can in some instances have concurrent jurisdiction with the Commission over car service where elements of intrastate commerce are present, this case would still have to be dismissed in state court because (a) there was no intrastate commerce and (b) the Commission

had already decided that the cessation of service was lawful.

The claims of Kalo all depend upon the issue of the reasonableness of the Transportation Company's operating practice of ceasing operation over its line to Kalo's plant and providing cars to Kalo at the Fort Dodge, Iowa rail station. Even a federal court loses jurisdiction to the Commission in a car service case where the issue is whether a rail carrier's rule or practice is reasonable. Federal courts have jurisdiction only when a rule or practice of the rail carrier is admittedly reasonable and the only issue to be decided is whether the carrier adhered to the rule or practice. *Midland Valley RR. Co.* v. *Barkley, et al.*, 276 U.S. 482, 484-487 (1927); *U.S.* v. *New River Co.*, 265 U.S. 533, 541-542 (1923).[21] The same is of course true as to a state court, and that is particularly clear where, as here, the Commission has already ruled the practice is lawful. Even the trial court judge ruled that the issues in this case should be decided by the Commission rather than a county court judge. (Trial Court Opinion, Appendix p. 21a, 24a).

The Commission has been held to have primary jurisdiction to decide whether a rail carrier may institute a new practice of providing service to a shipper on a less frequent basis. *Elgin Coal Co.* v. *Louisville & Nashville R.R. Co.*, 411 F.2d 1043, 1045-1046 (6th Cir. 1969). The Supreme

---

[21] Also, see *Morrisdale Coal Co.* v. *Pennsylvania R.R. Co.*, 230 U.S. 304, 313-314, 57 L.Ed. 1494, 1497, 33 S.Ct. 938 (1912); *Loomis* v. *Lehigh Valley RR. Co.*, 240 U.S. 43, 50-51, 60 L.Ed. 517, 519-520, 36 S.Ct. 228 (1916); *I.C.C.* v. *Baltimore & Annapolis R.R. Co.*, 398 F.Supp. 454, 467-468 (D. Md. 1975), aff'd 537 F.2d 77 (4th Cir.) cert. denied 429 U.S. 859, 97 S.Ct. 159, 50 L.Ed. 2d 136 (1976).

Court of the United States held a state court could not even entertain an action to require a rail carrier to construct inside doors on its produce hauling cars because the Interstate Commerce Commission had primary jurisdiction over the issue. *Loomis* v. *Lehigh Valley R.R. Co.*, 240 U.S. 43, 48-51 (1916).[22] Certainly a rail carrier should not be subject to an award of substantial damages against it for failure to make a large investment necessary to continue operations over a railroad line unless the Commission first decides the carrier's conduct has been unreasonable.

Even if one assumes that the Iowa District Court for Webster County did at one time have concurrent jurisdiction with the Commission, it has no jurisdiction now because it cannot act in a manner inconsistent with an order of the Commission. *Far East Conference* v. *United States,* 342 U.S. 570, 574-575 (1952); 49 U.S.C. §1 (17) (a). The Iowa Supreme Court's disregard of an existing, unchallenged order of the Commission amounts to an attempt to enlarge the jurisdiction of Iowa district courts in a manner not permitted by Title 49 of the United States Code.

---

[22] Both *Pennsylvania R.R. Co.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 130 (1915) and *Illinois Central R.R. Co.* v. *Mulberry Hill Coal Co.*, 238 U.S. 275, 280-281, (1915), relied upon in the Iowa Court of Appeals opinion, were distinguished in the later case of *Midland Valley R.R. Co.* v. *Barkley,* 276 U.S. 482, 486-487 (1927), by the Hon. Justice Brandeis on the grounds that in neither *Puritan* nor *Illinois Central* "was the reasonableness of the carriers' practice in controversy." Likewise, *Pennsylvania R. Co.* v. *Sonman Shaft Co.,* 242 U.S. 120, 125-126 (1916), also relied upon by teh Iowa Court of Appeals, did not involve the question of the reasonableness of the defendant's practice. See, *Spence* v. *Baltimore & Ohio Railroad Company,* 360 F.2d 887, 890 (7th Cir. 1966).

CONCLUSION

The Interstate Commerce Act has preempted state law in the subject matter area of this case. Kalo's sole remedies under the Act lie in federal district court or before the Commission. Furthermore, the doctrine of primary jurisdiction gives the Commission exclusive jurisdiction over the issues that are determinative of Kalo's claims. Yet in this case, the Iowa Court of Appeals has not only refused to follow the federal doctrines of preemption and primary jurisdiction, but has also refused to give effect to the Commission orders that collaterally estop Kalo from relitigating the issues necessary to the proof of its claims. The position taken by the Iowa Court of Appeals on the issues presented in this case is an improper attempt to enlarge the jurisdiction of the state district courts of Iowa by refusing to follow the governing federal law.

For these reasons, and others set forth above in this brief, petitioner respectfully prays that this Court enter judgment taxing costs to Kalo, reversing the judgment of the Iowa Court of Appeals, and ordering the Iowa Court of Appeals to reinstate the judgment of the Iowa District

Court of Webster County, Iowa, dismissing with prejudice:

1) Kalo's original petition;

2) Kalo's Division II of its petition, as amended;

3) and Kalo's Division III of its petition, as amended.

Respectfully submitted,

LOUIS T. DUERINCK
JAMES P. DALEY
STUART F. GASSNER
400 West Madison Street
Chicago, Illinois 60606
Telephone: (312) 454-6506

FRANK W. DAVIS, JR.
BRUCE E. JOHNSON
JAMES D. POLSON
2600 Ruan Center
Des Moines, Iowa 50309
Telephone: (515) 243-6251

SUPREME COURT, U. S.
FILED
OCT 10 1980
MICHAEL RODAK, JR., CLERK

No. 79-1336

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
A CORPORATION,
Petitioner,

v.

KALO BRICK & TILE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

RESPONDENT'S BRIEF ON THE MERITS

M. GENE BLACKBURN
NED ALAN STOCKDALE
(Counsels of Record)
142 North 9th Street
Fort Dodge, Iowa 50501
(515) 576-2171
Attorneys for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT:

A. The Interstate Commerce Commission Did Not Have Primary Jurisdiction To Determine Those Questions Of Fact Essential To Kalo's State Law Claims 5

B. Kalo's Claim Is Not Barred By The Commission's Order Permitting Abandonment Because: (1) The Commission Did Not Have Primary Jurisdiction Over Those Questions Common To Kalo's Claims; (2) Having Already Been Forced To Abandon Its Business, Kalo Had No Interest In Resurrecting Rail Service 8

C. The Remedies Provided By The Interstate Commerce Act Are Cumulative And In Addition To Those Existing Under State Or Common Law Over Which State Courts Have Concurrent Jurisdiction, Except Where The Commission Has Primary Jurisdiction 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES

Alabama Public Service Comm'n v. Southern Ry., 341 U.S. 346, n.7 (1951) 7
Anderson v. Pinkett, 439 F.2d 619 (D.C. Cir. 1971) 9
Ciba Corp. v. Weinberger, 412 U.S. 640 (1973) 8
Colorado v. U.S., 271 U.S. 153, 164 (1926) 7
Cromwell v. County of Sac, 94 U.S. 351, 356 (1877) 9, 10
Eastern Ry. v. Littlefield, 237 U.S. 140 (1915) 4
Far East Conference v. United States, 342 U.S. 570, 574-75 (1952) 5
Illinois Central R.R. v. Mulberry Hill Coal Co., 238 U.S. 275, 281-283 (1915) 4, 12
ICC v. Atlantic Coast Line R.R., 383 U.S. 576 (1966) 7
ICC v. Chicago & Northwestern Transp. Co., 533 F.2d 1025, 1027, 1028 (8th Cir. 1976) 5, 6, 7, 11-12
ICC v. Chicago, Rock Island & Pac. R.R., 501 F.2d 908 (8th Cir. 1974), cert. denied 420 U.S. 972 .....4, 5, 6, 7, 8, 12, 13
ICC v. Maine Central R.R., 505 F.2d 590 (2nd Cir. 1974) 6, 7, 12, 13
Johnson v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 400 F.2d 968, 971 (9th Cir. 1968) 5, 7
Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-331, n.20 (1979) 4, 10
Pennsylvania R.R. v. Puritan Coal Mining Co., 237 U.S. 121 (1915) 4, 9, 12
Pennsylvania R.R. v. Sonman Shaft Coal Co., 242 U.S. 120 (1916) 12
Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) 6-7, 12

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) 8-9
United States v. Western Pac. R.R., 352 U.S. 59 (1956) 8
United States Express Co. v. Kountze Bros., 8 Wall. (75 U.S.) 342 (1869) 13

STATUTES & REGULATIONS

Interstate Commerce Act:

(Title 49 U.S.C. was revised by Public Law 95-473, October 17, 1978, without substantive change (49 U.S.C. §10101, et seq.) Since all cases cited in this brief refer only to the pre-revision section headings, the argument in this brief also refers to those section headings. The pre-revision sections are correlated here with the sections of the new revised Act.)

Pre-revision Act	Revised Act	
49 U.S.C. §1(4)	§10101(a)	5
49 U.S.C. §1(11)	§11121	5
49 U.S.C. §1(18)	§§10901, 10902 and 10907	6
49 U.S.C. §8	§11705	9
49 U.S.C. §9	§11705	9
49 U.S.C. §22	§10103	11
49 U.S.C.A. §1(20)		9

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, Section 802, 90 Stat. 127-130 13

Code of Iowa, 1973

§479.3 2
§479.122 2

MISCELLANEOUS

H. R. Rep. No. 96-1005, Part 1, 96th Cong., 2nd Sess. 7 (1980) 9
H. R. Rep. No. 96-1008, Part 1, 96th Cong., 2nd Sess. 13, 14 (1980) 9
S. Rep. 96-253, 96th Cong., 1st Sess. 1 (1979) 9
1B Moore's Fed. Prac. ¶0.444, 4006-4007 (1980) 10
Restatement (Second) of Judgments (Tentative Draft No. 2, 1975) §§68, 88(2), (5), (6), (7) 11

No. 79-1336

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
A CORPORATION,
Petitioner,

v.

KALO BRICK & TILE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This action arises out of the Chicago and North Western Transportation Company's (hereinafter "CNW" or "Railroad") negligent failure to maintain its branch line to the plant of Kalo Brick & Tile Company (hereinafter "Kalo").

On September 13, 1974, Kalo filed its petition in the Iowa District Court. Kalo's amended petition alleged that because of the Railroad's failure to use ordinary care in maintaining its branch line track, the branch line became

unserviceable on April 4, 1973, which in turn forced Kalo to liquidate its assets and close in August, 1973.

Kalo's claim of actionable negligence was based upon the Railroad's common law duties made actionable by Section 479.122, Code of Iowa 1973; and its duty to furnish suitable car service pursuant to Section 479.3, Iowa Code 1973. Kalo also alleged common law tortious interference with contractual relationships.

Prior to the filing of Kalo's Petition in the Iowa District Court for Webster County, the Railroad filed on November 14, 1973, an application to the Interstate Commerce Commission for a certificate of public convenience and necessity permitting abandonment of the Kalo branch line based in part on the fact that Kalo as the only branch line user was out of business. Proceedings before the Commission were conducted at Washington, D.C., under the Commission's modified procedure. Kalo did not actively participate in proceedings before the Commission, as it had no interest in the restoration of service. Kalo did not appeal the Commission's order finding Kalo in default and permitting the abandonment, but rather proceeded with the action that was then pending in the Iowa District Court for Webster County.

The facts of the case are as follows:

For in excess of fifty years, Kalo relied upon the CNW and its predecessors in interest as its primary and principal source of transportation for its clay tile products. Kalo was initially serviced by the Minneapolis & St. Louis Railroad, which provided suitable car service until it was acquired by the Chicago and North Western Transportation Company in 1960. After the CNW took over the branch line serving the Kalo plant, service began to deteriorate. Beginning in 1961 and continuing into 1967,

the branch line serving the Kalo plant was intermittently out of service due to earth slides which damaged the track serving the Kalo plant. In 1967, the CNW leased and agreed to maintain a portion of the Fort Dodge, Des Moines & Southern railroad tracks which provided alternate access to the Kalo plant.

In March of 1973, ponded water was discovered around a portion of the CNW's leased track, which the Railroad admitted was contrary to sound maintenance practice. (J.A. 126). During the first few days of April, 1973, earth slides occurred along the leased track and other slides were developing because of improper maintenance procedures. (J.A. 91-92, 108).

On April 4, 1973, CNW notified Kalo that it could no longer provide cars at the Kalo plant because of the condition of the track and roadbed, notwithstanding the Railroad's prior commitment to maintain service to the Kalo plant. (J.A. 97). In fact, although the Railroad made verbal assurances of continued services to representatives of Kalo, they failed to even inspect the line during the five to six month period prior to the line's failure (J.A. 131), and furthermore, did not conduct any engineering or soil studies to determine what was necessary to maintain continued service. (J.A. 110-116, 120-121, 126-127, 135-136). The Railroad's failure to inspect, test or repair the Kalo branch line track was not brought to the attention of the Commission in the abandonment proceedings. (Def. Ex. YYY, Affidavits in support of abandonment application. R. 392, 394).

SUMMARY OF ARGUMENT

A. The doctrine of primary jurisdiction is not applicable because the question at issue falls within the conventional experience of judges and does not require special expertise to assure consistency within an administrative framework. *United States v. Western Pac. R. Co.*, 352 U.S. 59, 64-65 (1956).

B. The Commission's determination that the Railroad lawfully abandoned the Kalo branch line does not preclude Kalo from urging a contrary position in state court because: (1) the Commission did not have primary jurisdiction to determine the common operative facts, and (2) the Commission's order was entered in proceedings in which Kalo had no incentive to participate, its business having already been destroyed. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-331, n.20 (1979).

C. A state court has concurrent jurisdiction over state law damage claims as a cumulative remedy expressly preserved by Section 22 of the Interstate Commerce Act, where the claim for relief is outside the Commission's primary jurisdiction. *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121; *Eastern Ry. v. Littlefield*, 237 U.S. 140 (1915); *Illinois Central R.R. v. Mulberry Hill Coal Co.*, 238 U.S. 275 (1915).

ARGUMENT

A. The Interstate Commerce Commission Did Not Have Primary Jurisdiction To Determine Those Questions Of Fact Essential To Kalo's State Law Claims.

Although the Commission contends that the doctrine of primary jurisdiction is not squarely at issue because the Commission had the opportunity to consider Petitioner's abandonment application prior to trial in state court (Br. for *amicus curiae*, 20, n. 20), it nonetheless forms the predicate for an analysis of other issues. The common pivotal question underlying Kalo's state law claims of negligence and the Railroad's allegation of a lawful abandonment under federal law turns on the factual question of whether or not the abandonment occurred because of conditions beyond the Railroad's control so as to constitute a lawful embargo.[1] *ICC v. Chicago and N.W. Transp. Co.*, 533 F.2d 1025, 1027, 1028 (8th Cir. 1976); *ICC v. Chicago, Rock Island & Pac. R.R. Co.*, 501 F.2d 809, 911-913 (8th Cir. 1974), cert. denied 420 U.S. 972; *Johnson v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 400 F.2d 968, 971, 972 (9th Cir. 1968).

The doctrine of primary jurisdiction comes into play where a case raises issues of fact not within the conventional experience of judges or in a case where an administrative agency must exercise discretion to accomplish a congressional purpose. *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952). Whether or not a railroad abandoned a branch line for reasons beyond its

---

1. If a lawful embargo is imposed a carrier is not liable in damages for the cessation of service under Sections 1(4) and 1(11) of the Act. *ICC v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d at 911.

control is a question not beyond the conventional experiences of judges. *ICC v. Chicago and Northwestern Transp. Co.*, 533 F.2d 1025, 1027, 1028 (8th Cir. 1976). Whether or not this case requires the exercise of administrative discretion so as to accomplish the congressional purpose raises a second question.

Under Section 1(18) of the Act, a railroad is absolutely proscribed from abandoning any portion of a line of railroad until there shall first have been obtained from the Commission a certificate that the public convenience and necessity permits such abandonment. Clearly, the Commission has primary jurisdiction to weigh the public convenience and necessity in formal abandonment proceedings. In such proceedings, an important but not wholly determinative consideration is whether or not the abandonment proposed is due to circumstances beyond the control of the railroad. Where, however, a railroad abandons a line without authority from the Commission by way of an *embargo, see, ICC v. Chicago and Northwestern Transp. Co.*, 533 F.2d 1025, 1027, n.2 (8th Cir. 1976), the *sole issue* for determination is whether or not the service was terminated by compelling circumstances beyond the control of the carrier. *ICC v. Maine Central R.R.*, 505 F.2d 590, 593 (2nd Cir. 1974); *ICC v. Chicago, Rock Island & Pac. R.R. Co.*, 501 F.2d 908, 911 (1974). Therefore, where the issue is whether or not the railroad lawfully *embargoed* a line, the factual determinations fall squarely within the conventional experience of judges and the doctrine of primary jurisdiction is not applicable because questions of transportation policy are not at issue.[2] *ICC v.*

---

2. The reasonableness of a proposed abandonment is properly determined by the Commission's abandonment proceedings under Section 1(18) of the Act as where the principle consideration is application of uniform principles in the administration of national transportation policy. *See, Texas & Pacific Ry. v.*

(Continued on following page)

Chicago and Northwestern Transp. Co., 533 F.2d 1025, 1028 (8th Cir. 1976); *ICC v. Chicago, Rock Island & Pac. R.R. Co.*, 501 F.2d 908, 912-14 (8th Cir. 1974), cert. denied 420 U.S. 972 (1975); *See, ICC v. Maine Central R.R.*, 505 F.2d 590, 594 (2nd Cir. 1974); *Johnson v. Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 400 F.2d 968, 972-973 (9th Cir. 1968).

Kalo's petition was filed before the Commission authorized the abandonment and alleged that the cessation of service was due to the Railroad's negligent maintenance practices over which the Railroad had exclusive control. Therefore, the ultimate issue pending before the Iowa trial court was the same as was pending before the federal district court in *ICC v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 912-914 (8th Cir. 1974), cert. denied 420 U.S. 972 (1975) where the *Commission* successfully argued that the doctrine of primary jurisdiction did not apply.

Footnote continued—
Abilene Cotton Oil Co., 204 U.S. 426, 440-442 (1907); *ICC v. Atlantic Coast Line R.R.*, 383 U.S. 576 (1966).

A determination of reasonableness is not necessary to or part of Kalo's claim because it is predicated on those facts on which the CNW based its alleged *embargo*. As an embargo relieves a carrier of liability only where it is imposed for compelling circumstances not within the control of the railroad, the determination is one of fact and not reasonableness. *ICC v. Chicago and Northwestern Transp. Co.*, 533 F.2d 1025, 1027, n.2 (8th Cir. 1976).

As a corollary, while the Commission's jurisdiction over abandonments is exclusive, *Alabama Public Service Commission v. Southern Ry.*, 341 U.S. at 346, n.7 (1951); *Colorado v. U.S.*, 271 U.S. 153, 164 (1926), the same conclusion does not follow for embargoes or damage actions arising out of the same facts, as a determination of reasonableness is not required.

B. Kalo's Claim Is Not Barred By The Commission's Order Permitting Abandonment Because: (1) The Commission Did Not Have Primary Jurisdiction Over Those Questions Common To Kalo's Claims; (2) Having Already Been Forced To Abandon Its Business, Kalo Had No Interest In Resurrecting Rail Service.

As an incident of the abandonment proceedings, the Commission decided that the abandonment was due to circumstances beyond the Railroad's control, and by implication that the Railroad's embargo was lawful. Other circumstances were considered as well, including the fact that Kalo as the only branch line customer was then out of business. Assuming, arguendo, that the Commission did not have primary jurisdiction to consider the lawfulness of the alleged embargo standing alone, *ICC v. Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 912-914 (8th Cir. 1974), cert. denied 420 U.S. 972 (1975), then the assertion that the Commission's Order authorizing abandonment has a conclusive effect in subsequent judicial proceedings serves to indirectly extend the special or limited jurisdiction of the Commission beyond the allocation of power contemplated by the doctrine of primary jurisdiction. *United States v. Western Pacific R.R.*, 352 U.S. 59, 65 (1956). Stated otherwise, an incidental issue outside the Commission's primary jurisdiction should not conclusively[3] establish the principle issue in subsequent judicial proceedings, *United States v. United States Fidelity & Guaranty*

3. Petitioner and the Commission rely on *Ciba Corp. v. Weinberger*, 412 U.S. 640 (1973) for the proposition that state courts are bound by federal agency determinations. In *Ciba Corp. v. Weinberger*, however, there was no question as to the agency's primary jurisdiction with respect to the material issues before both the agency and the state court. Petitioner in *Ciba Corp.* had the incentive to and did vigorously participate in proceedings before the agency.

Co., 309 U.S. 506 (1940); *Anderson v. Pinkett*, 439 F.2d 619, 620 (D.C. Cir. 1971), lest an adversary choose an inconvenient and overly burdensome administrative forum[4] to foreclose his adversary. *Cromwell v. County of Sac*, 94 U.S. 351 (1877).

At first blush it may be gainsaid that Kalo should have vigorously protested the railroad's proposed abandonment before the Commission and appealed its adverse determination, or should have sought an injunction as was then permitted under 49 U.S.C.A. §1(20) (1970 ed.) or should have otherwise filed a complaint for damages with the Commission or in federal district court under Sections 8 and 9 of the Act. However, Kalo did not actively participate in the abandonment proceedings, or seek to enjoin the abandonment because it was already out of business, so that even if service was restored its business would not be resurrected. Instead, Kalo elected to pursue an alternative damage remedy in a local forum as contemplated by Section 22 of the Act as construed by *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915). Kalo's default in the abandonment proceedings admitted only that it no longer had an interest in continued rail service to its abandoned plant. Therefore,

---

4. Kalo is not the only small business in its present predicament. The Senate Committee on the Judiciary in reporting the Equal Access to Justice Act stated:

> The Bill rests on the premise that certain individuals, partnerships, corporations and labor and other organizations may be deterred from seeking review of or defending against unreasonable governmental action because of the expense involved in securing the vindication of their rights. The economic deterrents to contesting governmental action are magnified in these cases by the disparity between the resources and expertise of these individuals and their government. . . . S. Rep. 96-253, 96th Cong., 1st Sess. 1 (1979).

See also, H. R. Rep. No. 96-1005, Part 1, 96th Cong., 2nd Sess. 7 (1980); H. R. Rep. No. 96-1008, Part 1, 96th Cong., 2nd Sess. 13, 14 (1980).

neither the Railroad's allegations in its abandonment petition nor the Commission's findings of fact following Kalo's default should have collateral estoppel effect in the subsequent state court proceedings. *Cromwell v. County of Sac*, 94 U.S. 351, 356 (1877); 1B Moore's Fed Prac. ¶0.444, 4006-4007 (1980).

Collateral estoppel was considered from a different perspective in *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979), where this Court opted for a fairness analysis where the doctrine is asserted offensively. In *Parklane Hosiery*, this Court concluded that it may be unfair to bind a party in a suit where there was little incentive to vigorously defend. 439 U.S. at 329-331 (1979). Whether the first suit be for nominal damages or for administrative sanction of a *fait accompli*, it follows that without an incentive to vigorously participate, collateral estoppel may not be fairly employed to bar a nominal administrative adversary from seeking its only viable remedy in subsequent judicial proceedings. *See, Cromwell v. County of Sac*, 94 U.S. 351, 354-356 (1877).

An additional consideration bearing on fairness is the availability of procedural opportunities in the first and second proceedings. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-331 (1979). In the case *sub judice*, the Railroad initiated its abandonment proceedings before the Commission at Washington, D.C., forcing Kalo to defend in an inconvenient and procedurally foreign forum.[5] Under the Commission's modified procedure evidence was presented by verified statement and the matter was submitted without oral hearing. In contrast, in the state court proceedings, Kalo was permitted to take full discovery from the

---

5. **See note 4, *supra*.**

defendant and conduct live cross-examination of hostile wiitnesses, all as a matter of right.[6] As a result of these procedural opportunities in state court, Kalo was able to elicit admissions of fact from the Railroad which were not brought to the attention of the Commission in the abandonment proceedings.[7]

C. The Remedies Provided By The Interstate Commerce Act Are Cumulative And In Addition To Those Existing Under State Or Common Law Over Which State Courts Have Concurrent Jurisdiction, Except Where The Commission Has Primary Jurisdiction.

A state court's concurrent jurisdiction under Section 22 of the Act is preempted only where the Commission has primary jurisdiction. The common question of fact incidently before the Commission in abandonment proceedings and before the state court in Kalo's negligence action, was whether the Railroad abandoned the Kalo branch line for reasons beyond its control. In such cases, the *Commission* has previously argued successfully that a court need not defer to the Commission on grounds of primary jurisdiction, because resolution of the question depends upon facts within the conventional experience of judges and does not otherwise require the exercise of administrative discretion to accomplish national transportation policy. *ICC v. Chicago and Northwestern Transp. Co.*, 533 F.2d

---

6. See Restatement (Second) of Judgments (Tentative Draft No. 2, 1975) §§68, 88(2), (5), (6), (7). Kalo contends that the principles set forth in Section 88 of the Restatement should control as Kalo was not an opposing party as contemplated by Section 68.

7. *Compare*, Def. Ex. YYY, R. 392, 394 (Affidavits in Support of Abandonment Application), *with* J.A. 91-92 97; 108; 110-116; 120-121; 126-127; 135-136.

1025, 1028 (8th Cir. 1976); *ICC v. Chicago, Rock Island & Pac. R. Co.*, 501 F.2d 908, 911-13 (8th Cir. 1974); *ICC v. Maine Central R.R.*, 505 F.2d 590, 594 (2nd Cir. 1974). Where a court need not defer to the Commission's expertise regarding the application of federal law, the Commission *concedes* that state court jurisdiction is preserved under Section 22 of the Act in accordance with *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121 (1915); *Illinois Central R.R. v. Mulberry Hill Coal Co.*, 238 U.S. 275, 281-283 (1915), and *Pennsylvania R.R. v. Sonman Shaft Coal Co.*, 242 U.S. 120, 124-126 (1916) (Br. of *amicus curiae* at 24). *See, Texas & Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907).

The Commiission and the Railroad also argue that Kalo's state law damage claim is preempted by the Interstate Commerce Act because it has the effect of regulating interstate commerce in a manner potentially inconsistent with the Commission's federal purposes. The argument is bottomed on the premise that the Commission's ultimate authority to allocate capital for branch line maintenance would be effectively undermined if railroads were forced to maintain unprofitable branch lines for fear of damage suits in state courts.

Kalo submits that a state law damage remedy in the circumstances of this case is consistent with and serves the interest of both the national interest in a uniform transportation policy, as well as the local interest in reliable transportation services. A private damage remedy cognizable in either state or federal court encourages a railroad to abandon lines in accordance with established federal procedures in contrast to private strategies of deferred maintenance and intentional neglect. *See, ICC v. Chicago and Northwestern Transp. Co.*, 533 F.2d 1025,

1027-1028 (8th Cir. 1976); *ICC v. Chicago, R.I. & Pac. R. Co.*, 501 F.2d 911, 912 (8th Cir. 1974); *ICC v. Maine Central R. Co.*, 505 F.2d 590, 593-594 (2nd Cir. 1974). Where, indeed, a branch line is unprofitable or otherwise unserviceable for reasons beyond the railroad's control, Section 802 of the Four R Act of 1976[8] provides for expedited abandonment procedures to assure that needless losses need not be sustained. Stated otherwise, neither the railroad nor the Commission need fear state law damage actions so long as branch lines are abandoned in accordance with established procedures. Where, however, a railroad, having an opportunity of avoiding private damage actions, chooses to ignore the available federal procedures and embarks upon its own course of intentional or negligent abandonment, the railroad and not the innocent shipper should suffer the monetary damages. *United States Express Co. v. Kountze Bros.*, 8 Wall. (75 U.S.) 342 (1869).

CONCLUSION

The Interstate Commerce Act has preempted state law only to the extent of the primary jurisdiction of the Interstate Commerce Commission. Courts need not defer to the jurisdiction of the Commission where the critical question turns not on issues of national transportation policy but on issues of fact within the conventional experience of judges. Where the question is without the primary jurisdiction of the Commission, its decision does not collaterally estop Kalo from asserting a contrary position in support of a cumulative and consistent remedy in a state court action. For these and the other reasons set

---

8. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 127-130.

forth above, Respondent respectfully submits that the judgment of the Iowa Supreme Court should be affirmed.

Respectfully submitted,

M. GENE BLACKBURN
NED ALAN STOCKDALE
142 North 9th Street
Fort Dodge, Iowa 50501
515-576-2171
Attorneys for Kalo Brick & Tile Company

Supreme Court, U.S.
FILED
DEC 1 1980
MICHAEL RODAK, JR., CLERK

No. 79-1336

In the

Supreme Court of the United States

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

On Certiorari to the Court of Appeals of Iowa

PETITIONER'S REPLY TO RESPONDENT'S BRIEF ON THE MERITS

LOUIS T. DUERINCK
JAMES P. DALEY
STUART F. GASSNER
400 West Madison Street
Chicago, Illinois 60606
Telephone: (312) 454-6506

FRANK W. DAVIS, JR.
BRUCE E. JOHNSON
JAMES D. POLSON
2600 Ruan Center
Des Moines, Iowa 50309
Telephone: (515) 243-6251
Attorneys for Petitioner

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

	PAGE
COMMENTS ON RESPONDENT'S STATEMENT OF THE CASE	1
ARGUMENT	4
CONCLUSION	10

CITATIONS

CASES

Asbury v. Chesapeake and Ohio Railway Company, 314 F. Supp. 310 (D.D.C. 1970)	5
Chicago & North Western Ry. Co. v. Union Packing Co., 373 F.Supp. 734 (D. Nb. 1974)	5, 6
Chicago, Rock Island & Pacific Ry. v. Schendel, 270 U.S. 611 (1925)	9
Froehling Supply Co. v. United States, 194 F.2d 637 (7th Cir. 1952)	6
General Foods Corp. v. Baker, 451 F.Supp. 873 (D. Md. 1978)	5
Holt Motor Co. v. Nicholson Universal S.S. Co., 56 F.Supp. 585, (D. Mn. 1944)	5
I.C.C. v. Chicago & North Western Transportation Co., 533 F.2d 1025 (8th Cir. 1976)	7, 9
I.C.C. v. Chicago, Rock Island & Pac. R.R., 501 F.2d 908 (8th Cir. 1974), cert. denied 420 U.S. 972 (1974)	6, 7
I.C.C. v. Maine Central Railroad, 505 F.2d 590 (2nd Cir. 1975)	6, 7
Johnson v. Chicago, M. and St. P. R.R., 400 F.2d 968 (9th Cir. 1968)	7

PAGE

Missouri Pacific R.R. Co. v. Stroud 267 U.S. 404 (1925) 8

New York Central Railroad Company v. United States, 201 F.Supp. 958 (S.D. N.Y. 1962) 7

Powell v. United States, 300 U.S. 276 (1937) 7

Transit Commission v. United States, 289 U.S. 121 (1932) 8

CONSTITUTIONAL PROVISIONS AND STATUTES

46 U.S.C. §843, et seq. 5

Interstate Commerce Act:

(Title 49 U.S.C. was revised by Public Law 95-473, October 17, 1978, without substantive change. (49 U.S.C. §§10101, et seq.) Since all cases cited in this brief refer only to the pre-revision section headings, the argument in this brief also refers to those section headings. The pre-revision sections are correlated here with the sections of the new revised Act.)

Pre-revision Act	Revised Act
49 U.S.C. §1(20)	§§11702 and 11704
49 U.S.C. §9	§11705
49 U.S.C. §20(11) (proviso)	§10103
49 U.S.C. §20(11)	§§11707 and 10730

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-1336

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, A Corporation,

Petitioner,

vs.

KALO BRICK & TILE COMPANY,

Respondent.

On Certiorari to the Court of Appeals of Iowa

PETITIONER'S REPLY TO RESPONDENT'S BRIEF ON THE MERITS

COMMENTS ON RESPONDENT'S STATEMENT OF THE CASE

Kalo did actively participate in the abandonment proceedings before the Commission. In response to the Transportation Company's application for permission to abandon the Kalo branch line, Kalo filed "Objections to Abandonment" and a "Protest to Proposed Abandonment". (Rec., Def. Ex. YYY, Tr. p. 390-394).[1] The Com-

[1] "Rec." refers to items contained the record filed with the Clerk of the Supreme Court of the United States but not included in the Appendix to Petition for Writ of Certiorari or in the Joint Appendix.

mission ruled that Kalo had defaulted because it had not filed a verified statement in opposition as required. (I.C.C. Order entered April 30, 1976, Appendix p. 35a).[2] Kalo later filed an "Application for Re-hearing and Motion To Set Aside Order", verified by Kalo's counsel. (Rec., Def. Ex. YYY, Tr. p. 390-394).

The Commission then entered an order denying Kalo's Application for Rehearing saying that the Application "sets forth no material facts or arguments in addition to those previously considered in the proceeding; and that no showing has been made warranting reconsideration of said order. . ." (I.C.C. Order entered Sept. 23, 1976, Appendix p. 41a). This Order of the Commission was not appealed. Judgment in the present case was not entered in Webster County Iowa District Court until July 29, 1977.

Ponded water near the Shady Oak Transfer caused a portion of the roadbed to wash out. However, the line became impassable because of slides. The slides were caused by soil composition that made the slopes unstable.

---

[2] Pursuant to Rule 30 of the Rules of the Supreme Court for the United States, items already reproduced in the appendix filed as part of the Petition for Certiorari have not been reproduced in the Joint Appendix. Matters contained in the appendix to the petition for certiorari are cited in this brief as: (Appendix p. 1a.) Matters contained in the Joint Appendix are cited in this brief as: (Joint App. p. 77). The appendix contains pages 1a-76a. The Joint Appendix commences with page 77.

The slides causing the cessation of service were not caused by improper maintenance procedures.[3]

The trial court judge found that earth slides occurred on the Kalo branch line during the first days of April, 1973, that on April 4, 1973, the Transportation Company notified Kalo it could not provide cars, and that on April 18, 1973, Kalo had already notified its customers it was going out of business. (Trial Court Opinion, Appendix p. 15a). Between April 4, 1973, and April 25, 1973, the Transportation Company decided it could not maintain safe rail passage over the line, but the trial court judge found the Transportation Company had not at that time decided to attempt to abandon the line (Trial Court Opinion, Appendix, p. 16a). Thus, Kalo decided to go out of business *before* any attempt to abandon the line.[4]

---

[3] The trial court's findings stated:

> "The washout at the northern junction of the Shady Oak Transfer was comparatively simple for the Defendant Railroad to repair. The reason this line was removed from service was because of the slides which were taking place along many points of the line and the above washout of the railroad embankment was a single factor in the decision to terminate service over the line. There has been a long history of slides on the Fort Dodge, Des Moines & Southern Railway because of the composition of the soil. The slopes are unstable and several of the slopes are moving. The tracks are built on an unstable area." (Trial Court Opinion, Appendix p. 16a).

[4] The Trial Courts findings thus show that Kalo's alleged damages for destruction of its business could not have been caused by unlawful abandonment because the Transportation Company had no intent to abandon on April 18, 1973, when Kalo notified its customers it was going out of business.

ARGUMENT

THE INTERSTATE COMMERCE ACT HAS PREEMPTED THE POWER OF COURTS OVER RAIL CARRIERS IN INTERSTATE COMMERCE IN MATTERS OF RAILROAD LINE ABANDONMENT AND PROVISION OF CAR SERVICE OVER THOSE LINES.

Kalo's brief on the merits does not succeed in diminishing the importance of the major fact in this case: Kalo utilized the branch line in question entirely for shipment in interstate commerce. Kalo does admit that the issue of whether the cessation of rail service occurred because of conditions beyond the Transportation Company's control is central and common both to Kalo's state court negligence claims and to the Transportation Company's contention that it instituted a lawful embargo of interstate service and that abandonment of the line was lawful. (Br. of Respondent, p. 5.) The Commission ruled that cessation of service occurred because of conditions beyond the Transportation's Company control. (I.C.C. order entered April 30, 1976, Appendix, p. 35a). A state court should not be allowed to make an opposite ruling on the same causation issue and use that opposite ruling as the foundation for an award of damages against the Transportation Company. Such a result would undermine the uniformity sought by the Interstate Commerce Act.

The Transportation Company is an interstate common carrier suject to Chapter 1 of the Interstate Commerce Act, and therefore any person claiming to be damaged by the Transportation Company's violation of Chapter 1 of the Act must elect to bring its claim either before the

Commission or in federal district court. 49 U.S.C. §9 (1970 Ed.).[5] Determination of the validity of an embargo of interstate rail service is simply a determination of whether the carrier has breached its duty under the Interstate Commerce Act to provide interstate rail service. *Asbury* v. *Chesapeake and Ohio Railway Company,* 314 F. Supp. 310, 312-313 (D.D.C. 1970); *General Foods Corp.* v. *Baker,* 451 F.Supp. 873, 875-876 (D. Md. 1978).

The validity or reasonableness of embargoes is usually left to a determination by the Commission. *Asbury* v. *Chesapeake and Ohio Railway Company, supra,* at 313; *New York Central Railroad Company* v. *United States,* 201 F. Supp. 958, 959 (S.D. N.Y. 1962); *Chicago & North Western Ry. Co.* v. *Union Packing Co.,* 373 F. Supp. 734, 737 (D. Nb. 1974); *See, Holt Motor Co.* v. *Nicholson Universal S.S. Co.,* 56 F.Supp. 585, 591-592 (D. Mn. 1944) (decided under the Intercoastal Shipping Act of 1938, as amended 1938, 46 U.S.C. §§843, et seq.). If a shipper seeks relief because of an allegedly invalid or unlawful embargo of interstate rail service, and the shipper for some reason chooses not to initiate its claim before the Commission, the only possible forum remaining to the shipper is federal district court. *General Foods Corp.* v. *Baker,* 451 F.Supp. 873, 876 (D. Md. 1978); 49 U.S.C. §9 (1970 Ed.).

An embargo "is not promulgated for the protection of the shipper or the consignee but to protect transporta-

---

[5] Title 49, U.S.C. was revised by Public Law 95-473, October 17, 1978. 49 U.S.C. § 10101, et. seq. The section headings of the new revised Act are correlated with the section headings of the pre-revision Act in the table of citations, supra. In the body of the argument, citations will be to the pre-revision Act, since all cases cited refer to the pre-revision sections.

For these reasons, and others set forth above in this brief and in petitioner's initial brief on the merits, petitioner respectfully prays that this Court enter judgment taxing costs to Kalo, reversing the judgment of the Iowa Court of Appeals, and ordering the Iowa Court of Appeals to reinstate the judgment of the Iowa District Court of Webster County, Iowa, dismissing with prejudice:

1) Kalo's original petition;

2) Kalo's Division II of its petition, as amended;

3) and Kalo's Division III of its petition, as amended.

Respectfully submitted,

LOUIS T. DUERINCK
JAMES P. DALEY
STUART F. GASSNER
400 West Madison Street
Chicago, Illinois 60606
Telephone: (312) 454-6506

FRANK W. DAVIS, JR.
BRUCE E. JOHNSON
JAMES D. POLSON
2600 Ruan Center
Des Moines, Iowa 50309
Telephone: (515) 243-6251
Attorneys for Petitioner

Supreme Court, U.S.
FILED
JUL 31 1980
MICHAEL RODAK, JR., CLERK

No. 79-1336

In the Supreme Court of the United States

OCTOBER TERM, 1979

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, PETITIONER

v.

KALO BRICK & TILE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF IOWA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

WADE H. McCREE, JR.
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

CHARLES A. STARK
Attorney

Interstate Commerce Commission
Washington, D.C. 20423

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1336

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, PETITIONER

v.

KALO BRICK & TILE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF IOWA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

QUESTION PRESENTED

Whether the Interstate Commerce Act preempts state law authorizing a cause of action for damages brought by a shipper of goods in interstate commerce against a railroad based on the railroad's cessation of service to the shipper and abandonment of a line, where the Act empowers the Interstate Commerce Commission to approve the railroad's cessation of service and abandonment and affords remedies for violations of the railroad's statutory duties.

I

TABLE OF CONTENTS

	Page
Interest of amici curiae	1
Summary of argument	1
Argument:	
The Interstate Commerce Act provides the exclusive remedies for a cessation of service and abandonment of a railroad line by a carrier in interstate commerce and therefore preempts state law purporting to provide a damage remedy	4
A. The Interstate Commerce Act confers on the Commission plenary authority to regulate permanent abandonment of and temporary cessations of service over lines used in interstate commerce and provides remedies for violations	6
B. The substantive and procedural provisions of the Act respecting abandonment and the furnishing of transportation and car service preempt state law authorizing respondent's causes of action	12
C. Respondent's arguments in support of a state law cause of action here are without merit	22
1. The supposed "remedial" nature of state law	22
2. The *Puritan* case	23
Conclusion	26

TABLE OF AUTHORITIES

Cases:	
Alabama Public Service Comm'n v. *Southern Ry.*, 341 U.S. 341	13, 15

Cases—Continued: Page

Asbury v. *Chesapeake & Ohio Ry.*, 314 F. Supp. 310 ..... 10, 11

Baltimore Chamber of Commerce v. *Baltimore & O. R.R.*, 45 I.C.C. 40 8

Baltimore & O. R.R. Abandonment Fairmont Branch, 342 I.C.C. 751 17

Burlington Northern, Inc. v. *Department of Public Service*, 308 Minn. 43, 240 N.W.2d 554 ..... 15, 16

Chicago v. *Atchison, T. & S.F. R.R.*, 357 U.S. 77 5

Chicago & N.W. Ry. v. *Union Packing Co.*, 373 F. Supp. 734, aff'd, 514 F.2d 30 ..... 8, 10

Chicago & N.W. Transp. Co.-Abandonment, 348 I.C.C. 445 17

Chicago & N.W. Transp. Co.-Abandonment, 348 I.C.C. 635 17

Chicago & N.W. Transp. Co.-Abandonment, 348 I.C.C. 708 17

Chicago, Rock Island & Pacific Ry. v. *Hardwick Farmers Elevator Co.*, 226 U.S. 426 16

Ciba Corp. v. *Weinberger*, 412 U.S. 640 21

Colorado v. *United States*, 271 U.S. 153 .. 3, 6, 13, 14

De Canas v. *Bica*, 424 U.S. 351 ..... 20, 22

Eastern Ry. v. *Littlefield*, 237 U.S. 140 ..... 10, 11, 25

Erie R.R. v. *Tompkins*, 304 U.S. 64 23

Ethan Allen, Inc. v. *Maine Central R.R.*, 431 F. Supp. 740 10

Far East Conference v. *United States*, 342 U.S. 570 21

FPC v. *Louisiana Power & Light Co.*, 406 U.S. 621 21

Florida Lime & Avocado Growers v. *Paul*, 373 U.S. 132 20

Cases—Continued: Page

Froehling Supply Co. v. *United States*, 194 F.2d 637 7–8
General Foods Corp v. *Baker*, 451 F. Supp. 873 10
Great Northern Ry. v. *Public Service Comm'n*, 284 Minn. 217, 169 N.W.2d 732... 15
Hines v. *Davidowitz*, 312 U.S. 52..... 52
Illinois Central R.R. v. *Mulberry Hill Coal Co.*, 238 U.S. 275..... 24
ICC v. *Atlantic Coast Line R.R.*, 383 U.S. 576 ..... 9, 20
ICC v. *Baltimore & Annapolis R.R.*, 398 F. Supp. 454, aff'd, 537 F.2d 77, cert. denied, 429 U.S. 859 ..... 8, 11
ICC v. *Chicago & N.W. Transp. Co.*, 533 F.2d 1025 ..... 7, 10, 11
ICC v. *Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, cert. denied, 420 U.S. 972 ..... 7, 10, 11
ICC v. *Los Angeles*, 280 U.S. 52 9
ICC v. *Maine Central R.R.*, 505 F.2d 590.... 7, 11
ICC v. *Oregon-Washington R.R.*, 288 U.S. 14 9
ICC v. *Railway Labor Ass'n*, 315 U.S. 373... 6, 7
Jones v. *Rath Packing Co.*, 430 U.S. 519 .... 20, 22
Louisville & N. R.R. v. *Brashear*, 217 Ky. 439, 289 S.W. 1094 16
Maine Dep't of Transportation v. *ICC*, 587 F.2d 541 ..... 7, 14, 18
Michigan Public Service Comm'n v. *Mackinac Transp. Co.*, 43 F.R.D. 202 10
Midland Valley R.R. v. *Barkley*, 276 U.S. 482 25
Missouri-Kansas-Texas R.R. Abandonment, 338 I.C.C. 728..... 7, 17, 18
Missouri Pacific R.R. v. *Stroud*, 267 U.S. 404 3, 16

Cases—Continued: Page

Nader v. *Allegheny Airlines, Inc.*, 426 U.S. 290 ..... 21, 25
New York Central R.R. v. *United States*, 201 F. Supp. 958, appeal dismissed, 371 U.S. 805 8
New York Susquehanna & W. R.R. v. *Board of Pub. Util. Comm'ns*, 29 N.J. 513, 150 A.2d 656 15
Northern Pac. Ry. Abandonment—Montana, 348 I.C.C. 327 17
Pennsylvania v. *Penn Central Transp. Co.*, 348 F. Supp. 28, aff'd, 475 F.2d 1394 11
Pennsylvania R.R. v. *Puritan Coal Mining Co.*, 237 U.S. 121 ..... 4, 23-24, 25
Pennsylvania R.R. v. *Sonman Shaft Coal Co.*, 242 U.S. 120 24
Perez v. *Campbell*, 402 U.S. 637 ..... 21, 22
Powell v. *United States*, 300 U.S. 276 9
Public Utilities Comm'n v. *Baltimore & O. S.W. R.R.*, 281 Ill. 405, 118 N.E. 81 25
Purcell v. *United States*, 315 U.S. 381 6
Railroad Comm'n v. *Southern Pacific Co.*, 264 U.S. 331 15
Rules and Regulations, Nos. 31 and 32 In re, 193 Neb. 59, 225 N.W.2d 401 16
S. H. & W. Lumber Co. v. *California & Oregon Coast R.R.*, 154 F. Supp. 152 10
San Diego Unions v. *Garmon*, 359 U.S. 236 .. 20, 23
Service Storage & Transfer Co. v. *Virginia*, 359 U.S. 171 21
Terminal Railroad Ass'n v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1 ..... 20, 23
Texas & Pacific Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 ..... 21, 25

Cases—Continued: Page

T.I.M.E., Inc. v. *United States*, 359 U.S. 464 24-25
Transit Comm'n v. *United States*, 289 U.S. 121 ..... 13, 15
United States v. *New River Co.*, 265 U.S. 533 16
United States v. *Western Pac. R.R.*, 352 U.S. 59 9
Winnebago Farmers Elevator Co. v. *Chicago & N.W. Transp. Co.*, 354 I.C.C. 859 ..... 7, 18

Statutes and regulations:

Esch Car Service Act of 1917, ch. 23, 40 Stat. 101 25
Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971, 45 U.S.C. 431 *et seq.* 23
Section 205, 45 U.S.C. 434 23
Interstate Commerce Commission Act, 49 U.S.C. (1970 ed.) 1 *et seq.*, as amended and recodified by Pub. L. No. 95-473, 92 Stat. 1337, 49 U.S.C. (Supp. II 1978) 10101 *et seq.*:
49 U.S.C. (1970 ed.) preceding 1, 49 U.S.C. (Supp. II 1978) 10101(a)(1) and (2) 22
49 U.S.C. (1970 ed.) 1(3), 49 U.S.C. (Supp. II 1978) 10102(23) 7
49 U.S.C. (1970 ed.) 1(4), 49 U.S.C. (Supp. II 1978) 11101(a) ..... *passim*
49 U.S.C. (1970 ed.) 1(10), 49 U.S.C. (Supp. II 1978) 10102(3) 7
49 U.S.C. (Supp. II 1978) 11121 note 9
49 U.S.C. (1970 ed.) 1(11), 49 U.S.C. (Supp. II 1978) 11121(a) ..... *passim*
49 U.S.C. (1970 ed.) 1(14)(a), 49 U.S.C. (Supp. II 1978) 11122 7

because an award of damages for violation of state law would conflict with the Commission's determination that the cessation of service was lawful under federal law.

C. There is no merit to respondent's argument that state law is not preempted here because that law is "remedial" rather than "regulatory" in nature. The preemption doctrine turns on the *effect* of state law on the administration of a federal statute, not on labels. State law can regulate as effectively through an award of compensation as through an administrative process.

Respondent's reliance on *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915), and its progeny is similarly misplaced. The Court emphasized in *Puritan* that state courts cannot award damages under state law where, as here, the railroad's practice is attacked as unreasonable and the expertise of the Commission is therefore required. In such a situation, the Court explained, the exclusive remedy is the federal damage action provided by Sections 8 and 9 of the Act. A state law cause of action may lie under *Puritan* only where the carrier is alleged to have violated its own rule or practice, lawful on its face, and resort to the Commission's expertise accordingly is not required.

ARGUMENT

THE INTERSTATE COMMERCE ACT PROVIDES THE EXCLUSIVE REMEDIES FOR A CESSATION OF SERVICE AND ABANDONMENT OF A RAILROAD LINE BY A CARRIER IN INTERSTATE COMMERCE AND THEREFORE PREEMPTS STATE LAW PURPORTING TO PROVIDE A DAMAGE REMEDY

Respondent seeks damages under state law for injuries it allegedly sustained as a result of petitioner's cessation of railroad service over and eventual abandonment of its line

between Fort Dodge and Kalo, Iowa.[1] It is clear, and both respondent and the Iowa Court of Appeals concede (Br. in Opp. 5–6; Pet. App. 5a), that petitioner's cessation of service following the April 1973 earth slides, and petitioner's subsequent abandonment of its line following the Commission's order of September 23, 1976 (Pet. App. 40a–41a), were governed by the Interstate Commerce Act. Respondent, like the Iowa Court of Appeals, maintains only that the remedies provided in the Act are "cumulative" to those provided under state law (Br. in Opp. 5–8; Pet. App. 5a).

Respondent contends, in essence, that by bringing a damage action under state law, it may bypass the damage remedy Congress has provided in 49 U.S.C. (1970 ed.) 8 and 9, recodified at 49 U.S.C. (Supp. II 1978) 11705(b)(2) and 11705(c)(1),[2] ignore proceedings before the Commission to determine the lawfulness of petitioner's conduct, and avoid the effect of the Commission's order finding petitioner's cessation of service and abandonment of its line to be lawful under the Act. We submit that Congress' policy of ensuring "[n]ational rather than local control of interstate railroad transportation," *Chicago* v. *Atchison, T. & S.F. R.R.*, 357 U.S. 77, 87 (1958), and of entrusting the "fostering care of the railroad system" to the Commis-

---

[1] A statement of facts is contained at pages 3–7 of the government's brief at the petition stage in this case.

[2] In 1978, the Interstate Commerce Act was recodified without substantive change as subtitle IV of Title 49, United States Code. Pub. L. No. 95–473, 92 Stat. 1337. For convenience, references in this brief will be principally to the original Act because the decisions below, the controlling decisions of this Court, and the relevant decisions of the Interstate Commerce Commission cite the original Act. The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94–210, 90 Stat. 31 (the "4–R Act"), made certain changes in Section 1 of the Interstate Commerce Act which, except as otherwise noted, are not pertinent to the issues in this case.

sion, *Purcell* v. *United States*, 315 U.S. 381, 385 (1942), cannot be so readily undermined.

A. The Interstate Commerce Act Confers On the Commission Plenary Authority To Regulate Permanent Abandonment Of And Temporary Cessations of Service Over Lines Used In Interstate Commerce And Provides Remedies For Violations

The Interstate Commerce Act confers on the Commission authority to regulate both permanent and temporary cessations of service over railroad lines used in interstate commerce. Section 1(18) of the Act, 49 U.S.C. (1970 ed.) 1(18), recodified at 49 U.S.C. (Supp. II 1978) 10903(a), prohibits a railroad from abandoning a line permanently unless the Commission determines that the public convenience and necessity permit the abandonment. In making this determination, the Commission must balance the needs of those being served by the line against the interests of the carrier and the demands of the nation's transportation system, in order "to provide the public with an efficient and nationally integrated railroad system." *ICC* v. *Railway Labor Ass'n*, 315 U.S. 373, 376 (1942). See also *Purcell* v. *United States*, *supra*, 315 U.S. at 384–385; *Colorado* v. *United States*, 271 U.S. 153, 162–164 (1926). Factors that may be considered in the abandonment decision include the profitability of the line, the financial condition of the carrier, the effect of abandonment on the local community, the importance of the line in intrastate and interstate commerce, the amount of money required to rehabilitate and maintain the line, the possibility that such funds would better be allocated to the carrier's other lines and facilities, and the prudence of the railroad in managing the line. See, *e.g.*, *Colorado* v. *United States*, *supra*, 271 U.S. at 163–164, 169; *Purcell* v. *United States*, *supra*;

ICC v. *Railway Labor Ass'n*, *supra*; *Maine Dep't of Transportation* v. *ICC*, 587 F.2d 541, 542–543 (1st Cir. 1978); *Missouri-Kansas-Texas R.R. Abandonment*, 338 I.C.C. 728, 741–746 (1971).

The Commission also has authority, under 49 U.S.C. (1970 ed.) 1(4) and (11), recodified at 49 U.S.C. (Supp. II 1978) 11101(a) and 11121(a), to regulate temporary cessations of service over a line used in interstate commerce. Sections 1(4) and 1(11) impose on interstate rail carriers the obligation to provide and furnish transportation upon reasonable request and to furnish safe and adequate car service to shippers under reasonable rules and practices.[3] It is well settled that when a rail carrier ceases or suspends service for reasons allegedly beyond its control (a practice commonly known as an "embargo"), the Commission has jurisdiction under these sections of the Act to determine the reasonableness and, therefore, the lawfulness of the cessation or suspension. Thus, a lawfully imposed embargo excuses a railroad from its obligation under Sections 1(4) and 1(11) to furnish transportation and car service.[4]

---

[3] "Transportation," for these purposes, encompasses locomotives and cars as well as "instrumentalities and facilities" of shipment or carriage, such as track (49 U.S.C. (1970 ed.) 1(3), recodified at 49 U.S.C. (Supp. II 1978) 10102(23); *Winnebago Farmers Elevator Co.* v. *Chicago & N.W. Transp. Co.*, 354 I.C.C. 859, 872 (1978)). "Car service" concerns the use, supply, distribution, and interchange of locomotives and cars (49 U.S.C. (1970 ed.) 1(10), recodified at 49 U.S.C. (Supp. II 1978) 10102(3)), but not the transportation provided by means of these vehicles (*Winnebago Farmers Elevator Co.* v. *Chicago & N.W. Transp. Co.*, *supra*, 354 I.C.C. at 872). The Commission has broad powers under 49 U.S.C. (1970 ed.) 1(14)(a), recodified at 49 U.S.C. (Supp. II 1978) 11122, to establish rules and regulations defining carriers' service obligations.

[4] *ICC* v. *Chicago & N.W. Transp. Co.*, 583 F.2d 1025, 1027 n.2 (8th Cir. 1976); *ICC* v. *Maine Central R.R.*, 505 F.2d 590, 594 (2d Cir. 1974); *ICC* v. *Chicago, Rock Island & Pac. R.R.*, 501 F.2d 908, 911 (8th Cir. 1974), cert. denied, 420 U.S. 972 (1975); *Froehling Supply*

Various procedures and remedies ensure that the Act's abandonment, transportation, and car service policies are implemented soundly. First, the United States, the Commission, or a state may bring an action to enjoin a railroad from abandoning a line without first obtaining the Commission's approval. 49 U.S.C. (1970 ed.) 1(20), recodified at 49 U.S.C. (Supp. II 1978) 11505, 11702 and 11703.[5] In addition, a shipper or other interested party may file a complaint with the Commission alleging an unlawful abandonment (49 U.S.C. (1970 ed.) 13(1), recodified at 49 U.S.C. (Supp. II 1978) 11701(b)), may participate fully in abandonment proceedings before the Commission (49 C.F.R. 1121.36), and may seek judicial review of an abandonment order in the court of appeals pursuant to 28 U.S.C. 2321 and 2342(5).

The Commission may also initiate proceedings under 49 U.S.C. (1970 ed.) 13 to inquire into possible violations of Sections 1(4) and 1(11) and may enter an order finding a violation and requiring corrective action. If the carrier refuses to obey the order, the Commission, the Attorney General, or any injured party may bring an action in fed-

---

Co. v. *United States*, 194 F.2d 637, 641 (7th Cir. 1952); *ICC* v. *Baltimore & Annapolis R.R.*, 398 F. Supp. 454, 463 (D. Md. 1975), aff'd, 537 F.2d 77 (4th Cir.), cert. denied, 429 U.S. 859 (1976); *Chicago & N.W. Ry.* v. *Union Packing Co.*, 373 F. Supp. 734, 736–737 (D. Neb. 1973), aff'd, 514 F.2d 30 (8th Cir. 1975); *New York Central R.R.* v. *United States*, 201 F. Supp. 958 (S.D.N.Y.), appeal dismissed, 371 U.S. 805 (1962); *Baltimore Chamber of Commerce* v. *Baltimore & O. R.R.*, 45 I.C.C. 40, 53 (1917).

[5] At the time that petitioner ceased service to respondent in 1973, Section 1(20) also authorized "any party in interest," including a shipper, to seek an injunction. The 4-R Act of 1976 repealed Sections 1(19)–1(22) of the Act and replaced them with a new Section 1a. Pub. L. No. 94–210, Sections 801(b) and 802, 90 Stat. 127–130. Paragraph 9 of the new Section 1a preserved the right to bring an injunctive action only on behalf of the United States, the Commission, or a state. The recodified sections are similarly limited. Compare 49 U.S.C. (Supp. II 1978) 11704.

eral district court for enforcement of the order. 49 U.S.C. (1970 ed.) 16(12), recodified at 49 U.S.C. (Supp. II 1978) 11702(a)(3), 11703 and 11705(a). If the Commission concludes that Sections 1(4) and 1(11) have not been violated, a shipper or any other injured party may seek judicial review of that order in the court of appeals.[6]

If a rail carrier fails to meet its duty to furnish transportation or car service, Section 8 of the Act renders the carrier liable in damages to persons injured as a consequence. 49 U.S.C. (1970 ed.) 8. Section 9 of the Act authorizes an injured party to file a complaint seeking damages either with the Commission or in federal district court, 49 U.S.C. (1970 ed.) 9, although in the latter situation "the primary jurisdiction doctrine requires initial submission to the Commission of questions that raise issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the] Act." *ICC* v. *Atlantic Coast Line R.R.*, 383 U.S. 576, 579 (1966), quoting *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 65 (1956).[7] However, it is well settled that if an

---

[6]The Commission long has had authority to order a rail carrier to provide itself with facilities for performing its car service obligations and to extend its lines in certain circumstances. 49 U.S.C. (1970 ed.) 1(21); see *ICC* v. *Oregon-Washington R.R.*, 288 U.S. 14, 37 (1933); *ICC* v. *Los Angeles*, 280 U.S. 52, 64–65 (1929). As revised in 1978, however, the Act gives the Commission authority to order a carrier to provide itself with facilities or equipment to improve its car service only if the carrier will recover the cost of its investments and if the ability of the carrier otherwise to furnish safe and adequate transportation service will not be materially and adversely affected. Pub. L. No. 95–607, Section 402, 92 Stat. 3067; 49 U.S.C. (Supp. II 1978) 11121 note. Such upgrading of facilities to meet federal car service obligations now may be ordered only with the "greatest care." S. Rep. No. 95–1159, 95th Cong., 2d Sess. 16 (1978).

[7]Relying on this Court's decision in *Powell* v. *United States*, 300 U.S. 276 (1937), a number of courts have held that Sections 8 and 9 do

embargo has been lawfully imposed under Sections 1(4) and 1(11), the carrier is not liable in damages under Sections 8 and 9 for the cessation of service. *ICC* v. *Chicago, Rock Island & Pac. R.R.*, *supra*, 501 F.2d at 911; *ICC* v. *Chicago & N.W. Transp. Co.*, *supra*, 533 F.2d at 1027 n.2; *General Foods Corp.* v. *Baker*, 451 F. Supp. 873, 876 (D. Md. 1978); *Asbury* v. *Chesapeake & Ohio Ry.*, 314 F. Supp. 310, 313 (D.D.C. 1970); *Chicago & N.W. Ry.* v. *Union Packing Co.*, 373 F. Supp. 734, 737 (D. Neb. 1973), aff'd, 514 F.2d 30 (8th Cir. 1975). See also *Eastern Ry.* v. *Littlefield*, 237 U.S. 140, 145 (1915).

In the present case, the Commission exercised its authority under the statutory provisions described above. The Commission found that the estimated cost of rehabilitating petitioner's line would be in excess of $100,000 and that "due to the soil condition and mining activities in the area, the repairs would not be sufficient to insure continuous operations on the line" (Pet. App. 35a). After weighing these and other considerations, the Commission authorized abandonment of petitioner's line (Pet. App. 39a, 41a), concluding that "continued operation of the line would be an unnecessary burden on [petitioner] and on interstate commerce" and that respondent could not "insist that a burdensome line be maintained solely for its own use" (Pet. App. 35a–36a).

The Commission also found that the cessation of service to respondent prior to the effective date of the order authorizing abandonment "occurred because of conditions over which [petitioner] had no control," *i.e.*, the earth

---

not provide a damage remedy for unlawful abandonment. See *Ethan Allen, Inc.* v. *Maine Central R.R.*, 431 F. Supp. 740, 741 & n.4 (D. Vt. 1977); *Asbury* v. *Chesapeake & Ohio Ry.*, 314 F. Supp. 310 (D.D.C. 1970); *S.H. & W. Lumber Co.* v. *California & Oregon Coast R.R.*, 154 F. Supp. 152 (D. Ore. 1957); see also *Michigan Public Service Comm'n* v. *Mackinac Transp. Co.*, 43 F.R.D. 202, 203 n.1 (W.D. Mich. 1966). The Court need not address that issue here.

slides resulting from soil conditions and mining activities, "not because of willful abandonment" (Pet. App. 35a). This constituted a determination that petitioner's embargo[8]—its failure to furnish transportation and car service to petitioner after April 1973—was reasonable under Sections 1(4) and 1(11).[9]

Respondent did not avail itself of the various procedures under federal law to challenge the cessation of service and abandonment. For example, although respondent initially filed a protest to petitioner's abandonment application (Appendix in the Court of Appeals 50), it failed to comply

---

[8] Petitioner's notice of April 4, 1973 to respondent, the only shipper on the line, that it could no longer supply cars (Pet. App. 15a) was adequate to institute an embargo. *Eastern Ry.* v. *Littlefield*, *supra*, 237 U.S. at 145; *Asbury* v. *Chesapeake & Ohio Ry.*, *supra*, 314 F. Supp. at 313.

[9] There are situations in which an embargo that is initially justified because of circumstances beyond the carrier's control may cease to be justified and may thereafter become an unauthorized abandonment when the carrier fails to take reasonable measures to repair tracks and restore service. In such circumstances, the Commission, the United States, or a state may seek to have the unlawful abandonment enjoined, necessary repairs made, and service restored. See page 8, *supra*. Courts have generally viewed the granting of injunctive relief as discretionary and have sometimes declined to order extensive repairs where an imminent Commission order permitting abandonment would render the expenditure wasteful. See generally *ICC* v. *Chicago & N.W. Transp. Co.*, *supra*, 533 F.2d at 1026–1029; *ICC* v. *Maine Central R.R.*, *supra*, 505 F.2d at 593–595; *ICC* v. *Chicago, Rock Island & Pac. R.R.*, *supra*, 501 F.2d at 911–916; *ICC* v. *Baltimore & Annapolis R.R.*, *supra*, 398 F. Supp. at 461–466; *Pennsylvania* v. *Penn Central Transp. Co.*, 348 F. Supp. 28 (M.D. Pa. 1972), aff'd, 475 F.2d 1394 (3d Cir. 1973).

The Commission's conclusion in the present case that petitioner's cessation of service was reasonable and that extensive repairs to petitioner's and the leased tracks would not ensure continuous operations on the line (Pet. App. 35a) necessarily includes a finding that petitioner's failure to rehabilitate the line and restore service on it after the earth slides in 1973 was reasonable and that the embargo therefore continued to be lawful through the time that abandonment of the line was authorized in 1976.

with the Commission's order of September 18, 1975 (*id.* at 28–29) that it file a statement of fact and argument, along with affidavits of witnesses, in support of its protest (Pet. App. 34a–35a; see also 49 C.F.R. 1100.45–1100.54 (1974)). The Commission held respondent in procedural default (see 49 C.F.R. 1100.46(b) (1974)) and issued its order approving the abandonment and embargo principally on the basis of the evidence submitted by petitioner. Respondent did not seek judicial review of the Commission's order. Nor did respondent file a complaint for damages under Sections 8 and 9 of the Act or bring an action in federal district court to enjoin what it believed to be an illegal abandonment, as it was then authorized to do (see note 5, *supra*).

B. The Substantive And Procedural Provisions Of The Act Respecting Abandonment And The Furnishing Of Transportation And Car Service Preempt State Law Authorizing Respondent's Causes Of Action

The Iowa Court of Appeals held that §§ 479.3 and 479.122 of the Iowa Code Ann. (West 1946), invoked by respondent in support of its claim for damages, impose on railroads "the unqualified and unconditional duty to furnish car service and transportation to all persons who apply" (Pet. App. 5a). These are, of course, the very subjects governed by Sections 1(4) and 1(11) of the Act, albeit under a rule of reason (see page 7, *supra*). Moreover, under the Court of Appeals' decision, respondent apparently would be entitled to recover damages for injuries resulting from the continuation of the cessation of service beyond the date of the Commission's order authorizing abandonment of the line—*e.g.*, for profits lost after that date or for interference with respondent's contractual relationships that would have extended beyond or been en-

line therefore calls for the exercise of the Commission's expert judgment about the needs of the interstate rail system as a whole, just as does the abandonment decision itself. See, *e.g.*, *Maine Dep't of Transportation* v. *ICC*, *supra*, 587 F.2d at 354; *Winnebago Farmers Elevator Co.* v. *Chicago & N.W. Transp. Co.*, *supra*, 354 I.C.C. at 877.[17]

A state court considering a claim that a railroad's failure to maintain or rehabilitate a line was "negligent" under state law could strike a different balance than would the Commission in determining the reasonableness of the railroad's conduct. The state court might, for example, attach relatively more weight to the shipper's and local community's desire to keep a marginal line in service indefinitely or might attach little or no weight to competing demands for the railroad's and the interstate rail system's limited resources. Hence, recognition of a state damage remedy based on the railroad's alleged negligence in maintaining a line would necessarily interfere with the Commission's exercise of its abandonment jurisdiction.[18]

---

[17] If the Commission finds that a railroad intentionally allowed its line to fall into a state of disrepair in order to suffocate what would otherwise be a viable service and, thereby, to justify abandonment, it will find a "deliberate downgrading" of service and deny an abandonment application. *Missouri-Kansas-Texas R.R. Abandonment*, *supra*. If abandonment is denied, the Commission may, in appropriate cases, order an upgrading of the line sufficient to enable the railroad to meet its obligation under Section 1(4) to furnish rail transportation. *Winnebago Farmers Elevator Co.* v. *Chicago & N.W. Transp. Co.*, *supra*, 354 I.C.C. at 877-881.

[18] Congress recognized when it enacted the 4-R Act of 1976 that absorption by carriers of their losses on branch lines jeopardized the railroad industry's already precarious economic health (S. Rep. No. 94-499, *supra*). Section 802 of that Act instituted expedited abandonment procedures to ensure that these losses will not be needlessly suffered. See 49 U.S.C. (Supp. II) 10903 and 10904; H.R. Rep. No. 94-725, 94th Cong., 1st Sess. 54 (1975). Recognition of a state law cause of action in

This interference with federal interests would occur even if the acts complained of in the state proceedings preceded the railroad's filing of an application for abandonment—for example, even if the state courts in the present case were to limit damages to the period between April 1973 and September 1976, when the Commission authorized the abandonment. There is always some delay between the time an abandonment application is filed and the time the Commission grants or denies it. As in this case, an embargo is often in effect in the interim. If state law could compel a railroad to continue operations during this period, it would frustrate the Commission's abandonment authority by requiring massive last-minute commitments of funds solely to further a local interest.

For similar reasons, state law providing a cause of action based on allegations that a railroad's negligence in maintaining a line resulted in a cessation of service is also preempted by Sections 1(4) and 1(11). Such matters as the carrier's maintenance record, whether the initial halt in service was for reasons beyond the carrier's control, and possible justifications for failing to rehabilitate a line and restore service over it may all be relevant in determining the reasonableness of an embargo under these two sections. The proviso to Section 1(17)(a) of the Act (see page 15, *supra*) demonstrates that Congress did not intend to permit the states to impose independent and possibly inconsistent duties, under a negligence theory, governing the reasonableness of an interstate carrier's maintenance practices and ensuing embargoes. This is particularly so where, as here, an embargo is integrally related to an eventual abandonment of a line and the Commission must

---

an abandonment situation would render abandonment all the more complicated and potentially expensive, thereby frustrating the congressional intent underlying the foregoing provisions of the 4-R Act.

consider the reasonableness of the carrier's past conduct with respect to both.

Thus, Congress has "unmistakably * * * ordained" that federal regulation of abandonment of lines and the furnishing of transportation and car service in interstate commerce preempts state regulation. *De Canas* v. *Bica*, 424 U.S. 351, 356 (1976), quoting *Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963). Indeed, "the nature of the regulated subject matter permits no other conclusion." *Ibid.*[19]

2. In any event, the state law relied upon by respondent is necessarily preempted in the circumstances of this case, because an award of damages based on a violation of state law would conflict with the Commission's order finding petitioner's cessation of service and ensuing abandonment to have been lawful under federal law.[20] See 49 U.S.C.

---

[19] The state law invoked by respondent does not purport to regulate in an area that is traditionally a subject of state concern and that may impact on matters subject to the Commission's jurisdiction only incidentally or peripherally. Compare *Terminal Railroad Ass'n* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 4 (1943). Rather, the state law involved here seeks to establish duties to furnish transportation and car service in interstate commerce—the "central aim of federal regulation." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), quoting *San Diego Unions* v. *Garmon*, 359 U.S. 236, 244 (1959). Moreover, because regulation of interstate commerce by rail, perhaps as much as any other field, is not one "traditionally occupied by the States," *Jones* v. *Rath Packing Co.*, *supra*, 430 U.S. at 525, there is no occasion to indulge the presumption against preemption of state statutory and common law relied upon by respondent.

[20] Because the Commission had the opportunity, prior to trial in state court, to consider the legality under federal law of petitioner's cessation of service and abandonment, it is not necessary to consider in this case whether the primary jurisdiction doctrine required prior submission to the Commission of these federal law questions if a state law cause of action does survive here. Nevertheless, contrary to the Court of Appeals' conclusion (Pet. App. 10a–11a), we believe that the primary jurisdiction doctrine would be fully applicable in such circumstances. *ICC* v *Atlantic Coast Line R.R.*, *supra*, 383 U.S. at 579. That

1(17)(a) (state regulation even of intrastate service not valid where "inconsistent with any lawful order of the Commission"); *Perez* v. *Campbell*, 402 U.S. 637, 651–652 (1971); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); compare *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 299–300 (1976).

The result of allowing lawsuits such as this one to proceed would be to subject petitioner and other interstate railroads to conflicting obligations under federal and state law. Furthermore, imposition of state damage awards—or even the mere threat that they would be imposed—could result in a serious misallocation of scarce resources among the several states, thereby frustrating the Commission's

---

doctrine, requiring deferral to the expert federal administrative agency, has been applied equally in cases brought under state law. *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959); cf. *FPC* v. *Louisiana Power & Light Co.*, 406 U.S., 621, 647 (1972) (diversity case).

Respondent's contention to the contrary (Pet. 11) appears to be not that prior resort to the Commission was unnecessary, but that the Commission's order should have no bearing on its state law damage action. If respondent believed petitioner's conduct was illegal under federal law, however, it should have litigated these issues more vigorously before the Commission. *Service Storage & Transfer Co.* v. *Virginia*, *supra*, 359 U.S. at 179. And if respondent wished to challenge the Commission's order finding petitioner's conduct lawful, it was required to seek judicial review of that order in the manner provided in the Interstate Commerce Act. *FPC* v. *Louisiana Power & Light Co.*, *supra*, 406 U.S. at 647; *Far East Conference* v. *United States*, 342 U.S. 570, 577(1952). But the Iowa courts are bound by the Commission's order that petitioner's conduct was lawful under federal law. *Service Storage & Transfer Co.* v. *Virginia*, *supra*, 359 U.S. at 177–178; see also *Ciba Corp.* v. *Weinberger*, 412 U.S. 640 (1973).

Respondent cannot avoid the binding effect of the Commission's order by arguing (Br. in Opp. 11) that the standard of "reasonableness" under federal law is different from that under respondent's negligence and other state law claims and that its state law causes of action therefore raise different issues. As explained in the text, it is precisely where such disparities between federal and state law exist that state law purporting to impose independent transportation and car service duties on carriers in interstate commerce is necessarily preempted.

fulfillment of its obligation to promote adequate, economical, and efficient transportation and to foster sound economic conditions in transportation among the carriers. 49 U.S.C. (1970 ed.) preceding 1, recodified at 49 U.S.C. (Supp. II) 10101(a)(1) and (2). See also *Purcell* v. *United States, supra.* Accordingly, recognition of a state law damage remedy in the circumstances of this case would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526 (1977), quoting *Hines* v. *Davidowitz*, *supra*, 312 U.S. 52, 67 (1941); *De Canas* v. *Bica, supra,* 424 U.S. at 363.

C. Respondent's Arguments In Support Of A State Law Cause Of Action Here Are Without Merit

1. *The Supposed "Remedial" Nature of State Law*

The Iowa Court of Appeals conceded (Pet. App. 10a) that if the state statutes in question here were "regulatory" in nature, "it could not be gainsaid that federal law is supreme, rendering state law void." But the court concluded (*ibid.*) that the state law relied upon by respondent is "remedial only" and "exerts no burden on interstate commerce, nor does it interfere with regulatory powers and duties of the ICC." Respondent makes the same argument (Br. in Opp. 7-8).

Preemption, however, does not turn on mere labels or the intent of the legislature in enacting the state law. *Perez* v. *Campbell, supra,* 402 U.S. at 650-652.[21] It is the *effect* of the state law on the accomplishment of the purposes underlying the federal statute that is determinative. *Jones* v. *Rath Packing Co., supra,* 430 U.S. at 526. As

---

[21] As explained in our brief at the petition stage (at 11-12 n.4), the cases relied upon by respondent (Br. in Opp. 7 n.9) in no way suggest a distinction for preemption purposes between "regulatory" and "remedial" laws.

this Court stated in *San Diego Unions* v. *Garmon*, 359 U.S. 236, 247 (1959):

> [State] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

Moreover, as we have already explained (see pages 13–22, *supra*), and contrary to the assumption of the court below, an award of damages under state law for conduct authorized under federal law would exert a burden on interstate commerce and interfere with regulatory powers and duties of the Commission.

Finally, the preemption of state law in this case is not, contrary to respondent's contention (Br. in Opp. 7), "tantamount to the suggestion that every rail crossing case constitutes prohibited regulation of interstate commerce." The operation of trains at rail crossings has traditionally been subject to state regulation and does not require the Commission's expert consideration. Cf. *Terminal Railroad Ass'n* v. *Brotherhood of Railroad Trainmen*, *supra*, 318 U.S. at 4; note 19, *supra*. An injured party may therefore recover damages under state law for negligent operation of a train along an interstate railroad's right of way. See, *e.g.*, *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).[22]

2. *The* Puritan *Case*

The Court of Appeals' and respondent's reliance on *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 287 U.S.

---

[22] Railroad safety is regulated at the federal level by the Secretary of Transportation, principally pursuant to the Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971, 45 U.S.C. 431 *et seq.* Section 205 of that Act, 45 U.S.C. 434, addresses the delicate interplay of federal and state law in this area.

121 (1915), and several related decisions by this Court is misplaced (see Pet. App. 6a–10a; Br. in Opp. 5–8). In *Puritan*, the Court upheld an award of damages under state law to a shipper claiming that the railroad had failed to supply cars in accordance with a rule promulgated by the railroad itself. The Court stressed that in cases "where the [railroad's] rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission." 237 U.S. at 131. In such a case, the Court stressed that the shipper's sole remedy lay in a claim for damages under Sections 8 and 9 of the Act, not in state court. The Court reached this conclusion notwithstanding the provision in 49 U.S.C. (1970 ed.) 22, recodified at 49 U.S.C. (Supp. II (1978)) 10103, that nothing in the Act "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." The Court held, however, that where, as in *Puritan*, a railroad is sued for violating its own rule or practice, which is lawful and unchallenged on its face, state court jurisdiction "to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage" was preserved by Section 22 of the Act. 237 U.S. at 132.

The limited nature of the holding in *Puritan*—that state court jurisdiction is preserved only where resort to the Commission's expertise regarding the application of federal law is not required—was expressly reaffirmed in *Illinois Central R.R.* v. *Mulberry Hill Coal Co.*, 238 U.S. 275, 281–283 (1915), and *Pennsylvania R.R.* v. *Sonman Shaft Coal Co.*, 242 U.S. 120, 124–126 (1916), upon which the Court of Appeals and respondent also rely.[23] See also

[23] In *Mulberry*, the plaintiff did not attack the railroad's rule of distributing cars, so no issue within the Commission's exclusive or pri-

T.I.M.E., Inc. v. *United States*, 359 U.S. 464, 472-474 (1959); *Midland Valley R.R.* v. *Barkley*, 276 U.S. 482, 487 (1928); *Eastern Ry.* v. *Littlefield*, *supra*, 237 U.S. at 143; *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, *supra*, 204 U.S. at 446-447; *Public Utilities Comm'n* v. *Baltimore & O. S.W. R.R.*, 281 Ill. 405, 411-414, 118 N.E. 81, 83-84 (1917). Compare *Nader* v. *Allegheny Airlines, Inc.*, *supra*, 426 U.S. at 298-299.

The instant case, in contrast to *Puritan*, involves an assertion by respondent that petitioner's "practice" of discontinuing service subsequent to the earth slides was unreasonable and unlawful. That is an issue only the Commission could resolve (subject, of course, to judicial review in the federal courts), and the Commission has done so here, rejecting respondent's contention. As *Puritan* itself holds, state law causes of action are preempted in these circumstances. In addition, *Puritan* and the other decisions of this Court relied upon in the decision below preceded the enactment of the Esch Car Service Act of 1917, ch. 23, 40 Stat. 101, which first gave the Commission jurisdiction with respect to car service, and the Transportation Act of 1920. These statutes plainly establish the Commission's plenary authority to fix a reasonable level of car service, and the latter added Section 1(17)(a) to the Act, which preserves state jurisdiction only with respect to intrastate service. See page 15, *supra*.

---

mary jurisdiction was presented. 238 U.S. at 281-283. In *Sonman*, the Court found that industry conditions were normal and that the shipper's demands were reasonable; the carrier's rule or practice for allocating rail cars was therefore not a factor in the decision of the case, and the exercise of the Commission's expertise was not required. But in the instant case, conditions clearly were abnormal. Repeated earth slides had disrupted petitioner's line, and circumstances called for the administrative expertise of the Commission in determining whether the requirements of interstate commerce warranted continued service to respondent.

CONCLUSION

The judgment of the Court of Appeals of Iowa should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

KENNETH S. GELLER
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

RICHARD A. ALLEN
General Counsel

HENRI F. RUSH
Associate General Counsel

CHARLES A. STARK
Attorney
Interstate Commerce Commission

JULY 1980

☆ U.S. GOVERNMENT PRINTING OFFICE: 1980 325055 39